CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 8

NATIONAL SURETY COMPANY ET AL.,
PETITIONERS,

vs.

VALERIA E. CORIELL, MORRIS WHITE, INC.;
IRVING TRUST COMPANY, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 23, 1932

CERTIORARI GRANTED MAY 16, 1932

(36,541)

(36,541)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 8

NATIONAL SURETY COMPANY ET AL.,
PETITIONERS,

vs.

VALERIA E. COREILL, MORRIS WHITE, INC.;
IRVING TRUST COMPANY, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from the district court of the United States for the southern district of New York	1	1
Bill of complaint, verified April 6, 1931	1	1
Notice of appearance of defendant, dated April 6, 1931	11	7
Answer of defendant, verified April 6, 1931	12	8
Order appointing Irving Trust Company temporary receiver of Morris White, Inc., dated April 3, 1931	14	8
Order of Judge Knox requiring creditors to show cause why the offer made by Lily White to purchase all of the assets of Morris White, Inc., should not be accepted, dated May 12, 1931	24	15
Stipulation that receiver gave due notice of hearing pursuant to terms of order of May 12, 1931	25	16
Petition of Irving Trust Company, upon which the order of Judge Knox was based, requiring creditors to show cause why the offer made by Lily White to purchase all of the assets of Morris White, Inc., should not be accepted, verified May 12, 1931	26	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 9, 1932

INDEX.

	Original	Print
Exhibit 1—Annexed to the petition of Irving Trust Company, upon which the order of Judge Knox was based, requiring creditors to show cause why the offer made by Lily White to purchase all of the assets of Morris White, Inc., should not be accepted, being the offer of Lily White, dated April 29, 1931	30	18
Exhibit A—Annexed to the petition of Irving Trust Company, upon which the order of Judge Knox was based, requiring creditors to show cause why the offer made by Lily White to purchase all of the assets of Morris White, Inc., should not be accepted, being a certificate from the accountants stating the amount of liabilities of the defendant corporation as shown upon its books on the day of the appointment of the receiver	54	32
Exhibit 2—Annexed to the petition of Irving Trust Company, upon which the order of Judge Knox was based, requiring creditors to show cause why the offer made by Lily White to purchase all of the assets of Morris White, Inc., should not be accepted, being a resolution of the creditors' committee approving the offer of Lily White	55	33
Exhibit 3—Annexed to the petition of Irving Trust Company, upon which the order of Judge Knox was based, requiring creditors to show cause why the offer made by Lily White to purchase all of the assets of Morris White, Inc., should not be accepted, being an instrument duly acknowledged by Michael Hollander, chairman of the creditors' committee, submitting himself to the summary jurisdiction of the court	57	33
Order authorizing receiver to pay judgment of Pfister & Vogel Leather Company, dated May 14, 1931	59	34
Minutes on the hearing before Judge Knox held on May 8, 1931	62	36
Minutes on the hearing before Judge Knox held on May 25, 1931	77	47
Minutes on the hearing before Judge Knox held on May 26, 1931	78	48
Minutes on the hearing before Judge Knox held on May 27, 1931	93	59
Testimony of Morris White	175	118
Affidavit of Charles H. Tuttle in opposition, sworn to May 27, 1931, submitted and filed May 28, 1931. The appellees reserve the right, by agreement of all parties, to object on the argument of the appeal that the affidavit of Charles H. Tuttle was submitted and filed after the decision was rendered by Judge Knox	200	135

	Original	Print
Affidavit of T. M. Garrison in opposition, sworn to May 26, 1931, submitted and filed May 28, 1931. The appellees reserve the right, by agreement of all parties, to object on the argument of the appeal that the affidavit of T. M. Garrison was submitted and filed after the decision was rendered by Judge Knox	205	137
Decree making the receivership permanent, dated June 3, 1931	211	141
Stipulation of The Morris White Handbags Corporation and Morris White submitting themselves, etc	221	148
Order enjoining Morris White from violating terms, etc.	223	149
Decree of Judge Knox approving offer of Lily White, dated June 15, 1931, being the decree appealed from	226	151
Consents of the Government of the United States and of Morris White and of Lily White to entry of the decree of June 15, 1931	232	155
Notice of appeal from decree of June 15, 1931	237	157
Petition for allowance of appeal from decree of June 15, 1931	240	158
Order allowing appeal from decree of June 15, 1931	241	159
Assignment of errors	242	160
Citation (omitted in printing)	248	
Clerk's certificate (omitted in printing)	249	
Proceedings in United States circuit court of appeals for the second circuit	251	164
Opinion, Manton, J.	251	164
Clerk's certificate (omitted in printing)	257	
Decree	259	175
Order granting writ of certiorari	260	175

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. E 59-126

VALERIA E. CORIELL, Complainant,

against

MORRIS WHITE, INC., Defendant

BILL OF COMPLAINT—Verified April 6, 1931

The complainant, a citizen of the State of New Jersey and a resident of the City of Newark, Essex County, State of New Jersey, brings this bill of complaint on her own behalf and on behalf of all other creditors of the above-named defendant similarly situated who may join in the prosecution of this suit, and thereupon complains and alleges:

First. That this is a suit of a civil nature in equity between citizens of different states and wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

Second. That complainant is a citizen of the State of New Jersey and is a resident of the City of Newark, Essex County, State of New Jersey.

Third. Upon information and belief that defendant is a [fol. 2] corporation organized and existing under and by virtue of the laws of the State of New York and has its principal place of business at 621 Sixth Avenue in the Borough of Manhattan, City of New York, within the Southern District of New York, and is a resident of the City, County and State of New York in the said district.

Fourth. Upon information and belief that the object for which defendant was formed and the business it at all times has been engaged in was and is the manufacturing of fancy leather goods, both directly and through operating subsidiary corporations.

Fifth. Upon information and belief that the business of the defendant and its subsidiary corporations has been conducted successfully and prosperously since 1926, and was a growing and profitable business up to about a year ago. That owing to the business depression affecting industries generally in this country and the consequent diminution in demand for the products manufactured by defendant and its subsidiary corporations, the volume of business conducted by defendant has been diminished and as a result thereof a very substantial part of defendant's assets has become tied up in its inventories.

Sixth. Upon information and belief that the assets of the defendant corporation substantially exceed its liabilities; that the books of the defendant show, as of January 31, 1931, assets in excess of Four Million Dollars ($4,000,000.00) and liabilities of approximately One Million Dollars ($1,000,000.00); that the liabilities of defendant imme- [fol. 3] diately due and payable are, however, in excess of its quick assets available for payment of same.

Seventh. Upon information and belief that for several months past the bank and merchandise creditors of the defendant have cooperated with defendant in extending to it new credit in order to enable defendant to carry on its operations. That the large majority of the creditors of defendant in number and amount expressed their willingness to extend the time of payment of the indebtedness owing to them by defendant and to subordinate their respective indebtedness to indebtedness created for new money and new merchandise. That two of defendant's creditors have refused to work in harmony with the remaining creditors of defendant and one of said creditors on or about April 1st, 1931, obtained a judgment against defendant in the sum of approximately Twenty-five Thousand Dollars ($25,000) and that execution upon said judgment has been lodged with the Sheriff of New York County. That by reason of the action taken by such creditor the attempts of defendant to carry on its business have been defeated and defendant will be unable under existing conditions to secure sufficient funds and new merchandise to meet its necessary current and operating expenses and to liquidate its past due indebtedness or its indebtedness as to becomes due from time to time.

Eighth. Upon information and belief that the Sheriff of New York County has made or is about to make levy upon the assets of defendant, upon the execution aforesaid; that [fol. 4] certain of the other creditors of defendant, fearful of the waste of its assets by reason of any executions, are pressing their claims for payment and threatening to bring suit upon the same and threatening to attach the property of the defendant; that such action on the part of the creditors will result in further judgments, executions and seizures by sheriffs or other like officers and forced sales of the property of the defendant which would cause and create irreparable injury and loss to the defendant and to its creditors.

Ninth. That unless a receiver or receivers be at once appointed to take charge and possession of the property and assets of the defendant, the defendant will be subjected to a multiplicity of suits and conflicting litigation in this and other courts and its assets will be dissipated and sacrificed; some creditors will secure preference over other creditors; defendant's business will be interrupted and destroyed and the value of its property and assets generally diminished and impaired.

Tenth. Upon information and belief that at a forced sale resulting from attachment or other legal proceedings by creditors the value of the defendant's assets which as aforesaid greatly exceed its liabilities, would be very largely impaired, and the result would be disastrous to the creditors of said defendant and the protection which plaintiff has by reason of the value of the property of the defendant would be irreparably injured and destroyed.

Eleventh. Upon information and belief that if on the other hand the said properties of the defendant can be pre- [fol. 5] served and administered by this court and the business of the defendant continued by a receiver or receivers to be appointed by this court, then the value of the said assets which in a substantial measure is dependent upon the business of the defendant corporation being continued and the liquidation of the said assets at other than forced sale, will be maintained and the rights of the creditors protected.

Twelfth. That it is necessary for the protection and preservation of the rights and equity of plaintiff and other

creditors of the defendant and the assets of the said defendant that the properties and business of the defendant be preserved and administered in this suit through a receiver or receivers to be appointed by this court; that such appointment is necessary because said defendant is now unable to meet its matured and immediately maturing obligations and it will for some time in the future be unable to meet the same either from its assets or from the proper and reasonable use of its credit.

Thirteenth. That heretofore on or about December 12, 1930, defendant duly made its promissory note in writing dated on that date wherein and whereby it promised to pay to the order of New Jersey National Bank and Trust Company, on demand, the sum of Forty-five Thousand Dollars ($45,000.00); that payment of said note has been duly demanded but that no part thereof has been paid except the sum of Seventeen Thousand One Hundred Dollars ($17,100.00), leaving a balance due and owing upon said note of Twenty-seven Thousand Nine Hundred Dollars ($27,900.00) [fol. 6] with interest from March 31, 1931. That said New Jersey National Bank and Trust Company is a national banking association duly organized and existing under and by virtue of the laws of the United States of America and has its principal place of business in the State of New Jersey and is a resident of said state; that said New Jersey National Bank and Trust Company prior to the commencement of this action, duly transferred, assigned and delivered said note to plaintiff and plaintiff is now the holder thereof.

Fourteenth. That plaintiff as a creditor of defendant has no adequate remedy at law and brings this bill on behalf of herself and all other creditors of the defendant similarly situated who may come in and contribute to the expenses of this suit.

Wherefore the complainant prays for equitable relief as follows:

(1) That this court will forthwith appoint a receiver or receivers of all and singular the property and assets of every nature, wheresoever situated, held, owned or controlled by the defendant, with full power and authority to

take the same into his or their possession, with such powers as this court may from time to time grant, and for that purpose the power to incur such expenses as may be necessary or advisable in connection therewith; to purchase for cash or on credit such merchandise, supplies, material or other property as may be necessary or advisable in connection with the administration of the assets of the defendant; to sell in the regular course or conduct of business or otherwise all or any part of the assets and merchandise of the [fol. 7] defendant; to continue and conduct the business of the defendant for such period of time as the court may deem proper; to bring suit for, collect, receive and take into his or their possession all the property and assets, real and personal, goods, chattels, credits, rights, claims and equities, books, papers and securities and all other property whatsoever and wheresoever situated of the defendant; to institute, prosecute, become parties to, intervene in, compromise or defend suits and actions at law or in equity or otherwise, either for the recovery, protection or maintenance of any of the property and assets of the defendant as he or they may deem necessary or proper, including the institution and prosecution of such ancillary proceedings as said receiver or receivers may deem advisable, and including any other suits, actions or proceedings at law or in equity or otherwise in which the defendant may have any interest as plaintiff, defendant or otherwise, including the power to continue any such pending suits and defend or otherwise dispose of any such proceedings, suits or actions; to settle or compound or make allowances on any or all debts now due or owing or which may hereafter be due or owing to the defendant, as he or they may deem advisable or proper, subject to the further authorization of this court; to pay any claims for wages or otherwise that may be entitled to priority and with the other usual powers of receivers in such cases; and that the officers, managers, superintendents, agents and employees of the defendant be required forthwith to deliver up to said receiver or receivers possession of all and every part of the properties of the defendant wheresoever situated, including the several books, vouchers and papers in any way relating to the business of the defendant.

[fol. 8] (2) That this court will administer all and singular the property, rights and business of the defendant belonging to the defendant and will adjudicate, enforce and adjust the rights, liens, equities and claims of all the creditors of the defendant, including the complainant, as the same may be determined.

(3) That all creditors, stockholders and other persons be enjoined from instituting or presenting or continuing the prosecution of any actions, suits or proceedings at law or in equity or under any statute against the defendant and from levying any attachments, executions or other proceedings upon or against any of the properties of the defendant or from taking or attempting to take into their possession the property or any part of the property of the defendant or from interfering in any way with the possession, operation, control and management of the receiver or receivers.

(4) That a writ or writs of injunction issue out of and under the seal of this court, to be issued by one of the Judges thereof, directing, enjoining and restraining the defendant and the officers, superintendents, agents and employees of the defendant from interfering with, transferring, selling or disposing of any of the property or income of the defendant, or from taking possession of or levying upon or attempting to sell or dispose of, in any manner, any part of the property of the defendant.

(5) That this court will grant unto the plaintiff not only a writ of injunction but also a writ of subpœna of the United States of America, issued out of and under the seal of this court, and directed to the defendant, therein and thereby demanding it on a certain day therein named, under a certain penalty, before this court to answer (but not [fol. 9] under oath, an answer under oath being hereby expressly waived) of and in the premises, and to stand by, perform and abide by such orders, directions and decrees that may be made against it in the premises and as shall seem proper and right in equity and in good conscience.

(6) That at such time as may be found just and proper, the properties of the defendant may be ordered to be sold in whole or in part, in such manner and upon such terms and conditions as this court shall deem just and equitable

and that any such order of sale shall make proper and suitable provision for the preservation of all equities, rights, priorities, claims and liens of the creditors of the defendant and shall provide for the sale of the property of the defendant, subject to or free and clear of any and all liens and incumbrances, in whole or in part, in such manner and upon such terms as this court may direct and that the proceeds of any such sale be distributed among those entitled thereto as this court shall adjudicate, or that the properties of the defendant may be returned to it; and that the complainant may have such other and further and different relief in the premises as to this court may seem proper and as may be necessary fully to protect and enforce the rights and equities of the complainant and of all the creditors of the defendant; and that in case of any sale herein of the property of the defendant, it may be permitted to make, execute and deliver to the accepted purchaser or purchasers at any such sale such releases, bills of sale and conveyances as may be necessary or proper to vest in such purchaser or purchasers the title to all such several properties.

[fol. 10] (7) That such order shall be made by this court as to the service of this bill of complaint and of any order that may be made in this suit as may be deemed sufficient and proper to this court, and that the complainant may have such other and further relief in the premises as the nature and circumstances of the case may require and as to this court may seem just and proper.

And the complainant will ever pray, etc.

Valeria E. Coriell. Olcott, Holmes, Glass, Paul & Havens, Solicitors for Complainant, by Joseph Glass, Solicitor.

Duly sworn to by Valeria E. Coriell. Jurat omitted in printing.

[fol. 11] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEARANCE OF DEFENDANT—Dated April 6, 1931

SIRS: Please take notice that the defendant, Morris White, Inc., appears in this action and that I am retained as attor-

ney for it therein, and demand that a copy of the complaint and all papers in this action be served on me at my office No. 50 Broadway, Borough of Manhattan, The City of New York.

Dated New York, April 6th, 1931.

Yours etc., Nathan D. Stern, Attorney for Defendant. Office & P. O. Address: 50 Broadway, Borough of Manhattan, City of New York.

To Olcott, Holmes, Glass, Paul & Havens, Esqs., Attorneys for Complainant. Office & P. O. address: 170 Broadway, Borough of Manhattan, City of New York.

To the Clerk of the United States District Court, Southern District of New York.

[fol. 12] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF DEFENDANT—Verified April 6, 1931

Morris White, Inc., a corporation of the State of New York, the defendant in the above entitled cause, makes answer pursuant to the action taken by its Board of Directors, as follows:

It has, by counsel, entered a general appearance in said cause. It admits all the allegations of the bill of complaint and hereby consents to the appointment of a receiver or receivers as prayed for in said bill.

Morris White, Inc., by Morris White, President. (Seal.)

[fol. 13] *Duly sworn to by Morris White. Jurat omitted in printing.*

[fol. 14] UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Present: Hon. John C. Knox, U. S. D. J.

[Title omitted]

ORDER APPOINTING IRVING TRUST COMPANY TEMPORARY RECEIVER OF MORRIS WHITE, INC.—Dated April 6, 1931

This matter coming on to be heard this 6th day of April, 1931, upon the bill of complaint and answer to the complaint

filed in this cause, and after due deliberation it is, upon motion of the solicitors for the complainant,

Ordered, adjudged and decreed as follows:

First. The defendant, though appearing to have assets of large value, is now unable to meet its matured and immediately maturing obligations and will continue for considerable time to be unable to meet such matured and maturing obligations or any substantial portion thereof.

Second. The complainant is entitled to the relief herein granted; she has no adequate remedy save through the [fol. 15] granting of this decree, and it is necessary for the protection and preservation of the respective rights and equities of the complainant and all other creditors of the defendant that the property and business of defendant be preserved and administered in this suit through a receiver to be appointed by this court, and it is necessary that a receiver of the defendant and of its properties should be appointed forthwith, although the defendant is alleged to be solvent, and with powers herein granted.

Third. Irving Trust Company, a New York corporation, is appointed temporary receiver of the defendant and also of the properties of the defendant, real, personal and mixed, and of whatsoever kind and description including all lands, real estate and buildings, premises and appurtenances owned, controlled, leased or operated by the defendant, and all materials, supplies, merchandise, books of account, records, and other books, papers and accounts, cash on hand, in bank, or on deposit, things in action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills and accounts receivable, rents, issues, profits, tolls and income accruing and to accrue as well as all interests, easements, privileges, franchises and appurtenances and all assets and property of all and every kind, character and description whatsoever of said defendant wheresoever situated.

Fourth. The receiver is authorized and directed forthwith to take possession of all and singular said property and assets above mentioned wherever situated or found; to preserve, manage, maintain and operate said property including such property as the defendant holds, controls or oper- [fol. 16] ates; to use, manage and conduct the business of

the defendant; to exercise the authority and franchises of the defendant; to discharge all public duties obligatory upon it; to protect and preserve the corporate franchises, privileges, property and assets and the corporate existence of the defendant; to preserve its property in proper condition and repair; to manage and operate the property according to the requirements of the valid laws of the various States in which such property is situated, in the same manner that the defendant would be bound to do if in possession thereof; to keep the property insured as it may deem advisable; to maintain the offices of the defendant in said district and elsewhere as of the date hereof; to employ, discharge and, subject to the approval of this court, fix the compensation of all officers, attorneys, and managers; to employ, discharge and fix the compensation of all superintendents, agents and other employees; to collect and receive the income, rents, revenues, tolls, issues and profits of the said property and to collect all outstanding accounts, things in action and credits due or to become due or owing to the defendant and all dividends on stock and interest on bonds or other securities belonging to it; to make such payments and disbursements as may be needful and proper in its judgment in connection with any of the foregoing, and to hold and retain the net revenues of said property in such manner and to the end that the same may be applied under this order and under such orders as this court may hereafter make. The receiver shall be allowed six months from the date of this order (unless the time be extended by further order of this court) within which to elect to adopt or continue in force [fol. 17] or to refuse to adopt or continue in force any lease or other contract not fully performed which may be included in the property of which it is appointed receiver whether made by the defendant or by any predecessor of the defendant. Such election may be made from time to time and shall be made by instrument in writing subscribed by the receiver and filed in the office of the Clerk of this court, and no conduct or user of the rights by the receiver or payments made by it as rent or otherwise, or any other acts or omissions of the receiver within said period of six months unaccompanied by the filing of such written instrument, shall be deemed to conclude the receiver in respect of such election or be deemed to constitute an election to adopt or to continue in force any such contract, lease or agreement.

Fifth. The receiver is authorized and empowered to institute and prosecute, within this judicial district or elsewhere in any court or before any officer, department, commission or other tribunal and in its own name as receiver or in the name of the defendant as it may be advised by counsel, all such actions, proceedings or suits as in its judgment may be necessary for the recovery or proper protection of said property or any part thereof and the discharge of its trusts, and likewise to appear in and defend any and all actions, proceedings or suits which may be instituted and prosecuted against it as receiver in or before any such tribunal. The receiver is further authorized and empowered, whether before or after any action, proceedings or suits in respect thereof shall have been begun and subject to the approval of the court, to compromise and settle and, out of funds com- [fol. 18] ing into its hands as receiver, pay claims and demands on all accounts accruing against it as receiver after the date of this order and arising out of its possession, maintenance or operation of the property of the defendant which, in the judgment of the receiver, are meritorious and capable of adjustment on terms advantageous to and for the proper protection of the property in its charge as receiver. The receiver is further authorized to intervene in or become a party to such suits, actions, proceedings at law or in equity, including ancillary proceedings in State or Federal courts as may in its judgment be necessary or proper for the protection, maintenance and preservation of the property and assets of the defendant in carrying out the terms of this order.

The receiver is also authorized and empowered to appear in and conduct the prosecution or defense of any and all actions, proceedings or suits now pending or which may hereafter be brought in any court or before any officer, department, commission or other tribunal in which the defendant is or shall be a party which, in the judgment of the receiver, affect or may affect the property of which it is appointed receiver. The receiver is further authorized and empowered, whether before or after any action, proceeding or suit in respect thereof has been begun, but subject to the approval of this court, to compromise and settle claims and demands on all matters which have accrued against the defendant or which have arisen out of the possession, maintenance and operation by the defendant of its property without

regard to when the same arose, but no compromise or settlement of any such claim or demand shall be deemed to make [fol. 19] the claim or demand so compromised or settled an obligation of the receiver or to free the claimant from making such proof of his claim as so compromised or settled before any special master hereafter appointed or otherwise as this court or any special master may request, and no action taken by the receiver in the defense of any such action, proceeding or suit against the defendant or in compromising or settling any such claim or demand against the defendant shall have the effect of establishing any claim upon or right in the property or funds in the possession of the receiver so as to alter or change any existing equities or legal rights of the parties.

Sixth. The receiver shall open books of account and shall keep or cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the property of which it is appointed receiver, and shall preserve proper vouchers for all payments made by it on account thereof and shall deposit the monies coming into its hands in such banks as shall be selected by it and approved by the court.

Seventh. The receiver is authorized in its discretion from time to time until the further order of this court, out of the funds coming into its hands, to pay all necessary expenses of conducting the business of the defendant or incident to the execution of this receivership including, among other expenses, the wages, salaries and compensation of all officers, counsel, managers, superintendents, agents and employees retained or employed by the receiver as above provided.

[fol. 20] Eighth. All persons, firms and corporations having in their possession any of the property and premises of which the receiver is hereby appointed receiver, including all property of which the defendant is or may become the beneficial owner whether held by it or by other persons, firms or corporations as trustees, agents or otherwise, shall forthwith deliver such property and premises to the receiver and make such transfers, assignments and conveyances in connection therewith as may be necessary or proper, and each and every of the officers, directors, agents and employees of the defendant is hereby required and commanded

forthwith to turn over and deliver to the receiver, or to its duly constituted representatives, any and all books of account, records, vouchers and papers, deeds, leases, contracts, bills, shares, bonds and other securities, accounts, monies or other property in his or their hands or under his or their control belonging to or in the possession of the defendant or to which it is or may become entitled, and each of said officers, directors, agents and employees is hereby commanded and directed to abide by and conform to such orders as may be given from time to time by the receiver or its duly constituted representatives in conducting the operation of the property and in the discharge of its duties as receiver.

Ninth. The defendant, its officers, directors, attorneys, agents and employees and all persons claiming to act by virtue of or under it and all officers, marshals and sheriffs and all other persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, are hereby restrained and enjoined from in any way prosecuting any suits [fol. 21] or proceedings of any kind, nature or description against the defendant, or in any way interfering with, attaching, levying upon or in any manner whatsoever disturbing any portion of the assets, goods, monies, property and premises of which the receiver is hereby appointed, or from taking possession of or in any way interfering with the same or any part thereof, or in any way disturbing the possession of the receiver or from interfering in any manner to prevent the discharge by the receiver of its duties in the operation of the property and premises under the orders of this court.

Tenth. The receiver shall retain the possession of the property and continue to discharge the duties and trusts aforesaid until the further order of this court and from time to time make reports of its doing in the premises, and may from time to time apply to this court for such other and further orders and directions as it may deem necessary and requisite in the due administration of its trust.

Eleventh. The receiver is authorized to execute in its own name or in the name of the defendant, all necessary appeal, supersedeas, injunction or other bonds which may be required by law or in carrying out this order or any other orders of this court and to that end to enter into contracts with surety companies as sureties on such bonds and to

pay the reasonable charges of such surety companies therefor as well as any amounts they may be required to pay by reason of signing such bonds as sureties.

[fol. 22] Twelfth. All claims and demands against the defendant shall be presented to the receiver within three months from the date of mailing notice as hereinafter provided. The receiver shall give public notice accordingly by publication once in each of two successive calendar weeks upon any day in the week, in a newspaper printed in the English language and published in the City of New York, State of New York, of the time within which, the place where and the manner in which such claims and demands shall be so presented, and shall mail a copy of such notice by registered mail to each person, firm, corporation or association appearing on the books of the defendant to be a creditor or otherwise known to the receiver to be claiming to be such a creditor, at the last known address of such creditor or claimant.

All persons failing to present their claims or demands against the defendant to the receiver within said period of three months shall be barred from sharing the benefits of the distribution of the monies and proceeds of the properties of the defendant that now are or hereafter shall be in the hands of the receiver, and from sharing or participating in the distribution of any of the proceeds arising from the sale of the properties of the defendant if such sales shall be hereafter adjudged and decreed in this cause.

Thirteenth. The complainant herein and also the receiver are authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in or become parties to such suits, actions, proceedings at law or in equity including ancillary proceedings in State or Federal courts and in the courts of any foreign country as [fol. 23] may be deemed necessary or proper in aid of the orders issued by this court, and to apply to any such courts for such order or orders as may be deemed necessary or proper therefor. The right is reserved to the parties hereto to apply to this court for any other instructions to the receiver and the court reserves the full right and jurisdiction to make from time to time such further orders amplifying, extending, limiting or otherwise modifying this

order as to it may at any time seem proper, and in all respects and at all times to regulate and control the conduct of the receiver.

Fourteenth. In case of the resignation or removal of the receiver hereby appointed and the appointment of a successor or successors to the receiver who shall so resign or be removed, all the provisions of this order shall apply to such successor without further order of this court.

Fifteenth. The receiver shall further give at least ten days' notice by mail to all known creditors, claimants and stockholders of the defendant, that the matter of making said receivership permanent and/or modifying this order will be heard and determined on May 8th, 1931, at 4:30 o'clock P. M., in Court Room No. 2, Woolworth Building, Borough of Manhattan, New York, N. Y.

Jno. C. Knox, U. S. D. J.

[fol. 24] UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER OF JUDGE KNOX REQUIRING CREDITORS TO SHOW CAUSE WHY THE OFFER MADE BY LILY WHITE TO PURCHASE ALL OF THE ASSETS OF MORRIS WHITE, INC., SHOULD NOT BE ACCEPTED—Dated May 12, 1931

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

Ordered that all creditors of the defendant and any and all persons interested show cause at a term of this Court, to be held in Courtroom No. 2 in the Woolworth Building, No. 233 Broadway, Borough of Manhattan, City of New York, on the 26th day of May, 1931, at 4:30 o'clock in the afternoon of that day, or as soon therafter as counsel can be heard, why the offer made by Lily White, dated April 29, 1931, and submitted to Irving Trust Company as Receiver herein, should not be accepted and approved by

this Court, and at such time and place to consider and act upon any other offer or offers which may be then made; and it is further

[fol. 25] Ordered that a copy of this order, together with the annexed petition, be served upon all creditors of the defendant and all parties interested, in so far as they may be known to the Receiver, by mailing a copy thereof addressed to the said creditors and parties interested, at the addresses as appear upon the books of the defendant, on or before May 12th, 1931, and by publication on or before May 15th, 1931, in the New York Times of a notice briefly stating the provisions of this order.

Dated: New York, N. Y May 12, 1931.

Jno. C. Knox, U. S. D. J.

It is stipulated that the Receiver gave due notice of hearing pursuant to the terms of the foregoing order.

Dated New York, September 14, 1931.

Saul S. Myers, Attorney for National Surety Company, American Credit Indemnity Company, and London Guaranty and Accident Company, Ltd., Appellants. Baldwin, Hutchins & Todd, Attorneys for Hermann Loewenstein, Appellant. O'Connell & Butler, Attorneys for G. Levor & Co., Inc., Appellant.

[fol. 26] United States District Court Southern District of New York

[Title omitted]

Petition of Irving Trust Company Upon Which the Order of Judge Knox Was Based Requiring Creditors to Show Cause Why the Offer Made by Lily White to Purchase All of the Assets of Morris White, Inc., Should Not be Accepted—Verified May 12, 1931.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The petition of Irving Trust Company, as Receiver of the above-named defendant, by Olcott, Holmes, Glass, Paul & Havens, its attorneys, respectfully shows:

First. That your petitioner is a corporation duly organized under the banking laws of the State of New York and on the 6th day of April, 1931, was duly appointed Receiver of the defendant above named, has qualified, and is now duly acting as such receiver.

Second. That an offer, a copy of which is annexed hereto, marked Exhibit 1, has been submitted to your petitioner for the purchase of all the assets of the defendant and all of the right, title and interest of the Receiver [fol. 27] therein. The Court is respectfully referred to said offer for the details thereof.

Third. That pursuant to a call made by petitioner, a meeting of the creditors of the defendant was held on April 14, 1931, at which meeting petitioner made a preliminary report as to the assets and liabilities of defendant and the general status of the business of defendant. There were present at such meeting creditors with claims aggregating over $740,000 out of a total indebtedness of $1,072,000. At said creditors' meeting a creditors' committee consisting of nine creditors was unanimously elected. Upon information and belief that the members of said committee represent creditors whose claims aggregate $589,000.

Fourth. That said creditors' committee promptly met and appointed various sub-committees for the purpose of appraising the assets of the defendant and working out a plan of reorganization. Petitioner is advised that the plan embodied in the offer, a copy of which is hereto annexed, marked Exhibit 1, has resulted from the activities of said committee.

Fifth. That petitioner is advised that said offer was duly considered by said committee and was unanimously approved and that on April 29, 1931, said committee adopted a resolution, a certified copy whereof is hereto annexed, marked Exhibit 2.

[fol. 28] Sixth. Attached to said offer, and marked Exhibit A, is a certificate signed by Messrs. Klein, Hinds & Finke, certifying as to the amount of liabilities of the defendant corporation, as shown upon its books on the date of the appointment of the Receiver herein. A copy of said certificate is hereto attached.

Seventh. Attached hereto, and marked Exhibit 3, is an instrument duly acknowledged by Michael Hollander, Esq., chairman of said creditors' committee, wherein he expresses his willingness to undertake the matters referred to in said offer and wherein he, further, submits himself to the summary jurisdiction of this Court with regard thereto.

Eighth. That it has been made an express condition of said offer that same be accepted no later than May 29, 1931. For that reason an order to show cause is respectfully asked for.

Ninth. That in your petitioner's opinion prompt action is desirable in order to facilitate the prompt termination of this receivership.

Wherefore petitioner respectfully asks that the annexed order to show cause be signed.

Dated New York, N. Y., May 12th, 1931.

Irving Trust Company, by Robert L. Smith, Assistant Vice-President.

[fol. 29] *Duly sworn to by Robert L. Smith. Jurat omitted in printing.*

[fol. 30] EXHIBIT 1 ANNEXED TO THE PETITION OF IRVING TRUST COMPANY UPON WHICH THE ORDER OF JUDGE KNOX WAS BASED REQUIRING CREDITORS TO SHOW CAUSE WHY THE OFFER MADE BY LILY WHITE TO PURCHASE ALL OF THE ASSETS OF MORRIS WHITE, INC., SHOULD NOT BE ACCEPTED, BEING THE OFFER OF LILY WHITE DATED APRIL 29, 1931

[Title omitted]

To Irving Trust Company, Receiver in Equity of Morris White, Inc.:

First. The undersigned hereby offers to purchase from you, as Receiver in Equity of the property and assets of the defendant Morris White, Inc., all of the right, title and interest of yourself as such Receiver and all of the right, title and interest of the said Morris White, Inc., (a New York corporation having its principal place of business at

621 Sixth Avenue, Borough of Manhattan, City of New York,) in and to all of the assets, business and properties of Morris White, Inc., including (but not limited thereto) all cash on hand and in banks or otherwise on deposit (subject to all agreements entered into by you as Receiver as [fol. 31] to any such deposits), all accounts and notes receivable (subject to any existing assignments thereof heretofore made by Morris White, Inc.), trade acceptances, bills of exchange, claims, choses in action and other evidences of obligation; all inventories and merchandise (the same being likewise subject to any existing assignments thereof heretofore made by Morris White, Inc.), all interest, insurance and any other prepaid items; any and all amounts due from officers and employees; all the issued capital stock of any one hundred percent. owned subsidiary, and any and all stock of and investments in other companies, including investments or holdings represented by stock certificates, claims, accounts and/or notes receivable, and/or otherwise; all leases, leaseholds, subleases, licenses, furniture and fixtures; machinery, tools, appliances and equipment; and all materials and supplies; any and all manufactured products or materials in process of manufacture, all rights under any and all contracts and orders; all patents, processes, inventions, rights under and interests in and claims to patents, processes, inventions, trade marks, trade names, copyrights and trade rights of any kind, nature, description or sort and the good will of the said business of Morris White, Inc., and all other assets and/or properties of whatsoever kind, nature or sort; together with all rights, privileges and franchises used or of use in [fol. 32] or arising in connection with or had in connection with the said business of Morris White, Inc., as well as all of the right, title and interest of yourself as Receiver and/or of Morris White, Inc., the New York corporation, in and to the use of the name of "White" and/or "Morris White, Inc." and/or any and all other names used by said Morris White, Inc. in connection with its business, together with any and all moneys and receipts which have come or may come and remain in your possession as Receiver in any manner during the receivership, less, however, such amounts as were expended and/or obligated to be expended and/or will be expended or obligated to be expended by

you as Receiver in the conduct of the business of the said Morris White, Inc., in receivership, or otherwise in connection with the performance of your duties as Receiver including (but not limited to) all expenditures and/or obligations in connection with the purchase of merchandise, the borrowing of money, the renting or use of premises, the hiring of help, the advertising of the said business and all other expenses, commitments or obligations whatsoever incurred by you in connection with the carrying on of the said business of Morris White, Inc. by you in Equity Receivership and the performance of your duties as such Receiver. Anything herein contained or implied to the contrary notwithstanding, this purchase is intended to be of [fol. 33] only such title as is vested in you to said assets as Receiver in Equity of Morris White, Inc., subject to such increase or diminution or change in and to said assets and/or your title thereto as may result or have resulted from the operations of the Receiver up to the time the same shall be discharged from the custody of the Receiver pursuant to the terms of this offer. All assets referred to herein to be acquired pursuant hereto are to be sold "as are" at their situs at the time the New Corporation hereinafter referred to becomes entitled to their possession pursuant hereto, subject to all risks incident to levy of executions, attachments or other process and to the assertion and/or existence of any liens or claims of right of possession or ownership thereof.

Such assets as the undersigned may elect not to take shall be excluded herefrom, provided that notice of such election shall be given to the Receiver in writing before the bills of sale become deliverable as hereinafter provided for.

Second. The undersigned offers and agrees to do the following:

(1) Cause to be organized under the laws of the State of New York, a corporation under the name of "Morris White Handbags, Inc." (or such other name as may be available in the event that said name is not available) said corporation being hereinafter referred to as the "New Cor-[fol. 34] poration" with an authorized capital stock of ten thousand (10,000) shares, said capital stock to be divided into two classes: One thousand (1,000) shares thereof to

be common stock without par value which may be issued for such consideration as the Board of Directors of the corporation may deem advisable; nine thousand (9,000) shares thereof to be preferred stock, of the par value of One Hundred Dollars ($100) per share. Said preferred stock shall be issued by the New Corporation only and solely to or for the account of creditors of Morris White, Inc. (as hereinafter defined), at par, in payment of eighty percent. (80%) of the proved and allowed amount of the said indebtedness to said respective creditors, all as hereinafter provided; and said preferred stock shall not be is-ued or at any time reissued for any other purpose whatsoever.

The distinguishing preferences, rights, privileges, voting powers, restrictions, conditions, limitations and provisions upon which each of the said classes of stock shall be issued are as follows:

Except as otherwise provided by statute, and except as is expressly provided herein, the holders of the common capital stock shall have the sole and exclusive right to vote and consent for any purpose and the holders of the preferred stock shall have only such voice or vote in regard to the management of the corporation as is expressly herein granted and all other powers, express or implied, shall be [fol. 35] held and had by the owners and holders of the common stock; the said preferred stock shall not be entitled to vote upon the question of increase or decrease of the common capital stock of the corporation, nor the right to vote for any directors except to vote for directors who by the terms of the certificate of incorporation of the New Corporation are at any time to be elected by the holders of the preferred stock, nor shall they be entitled to vote in any proceeding for mortgaging the property and/or franchises of the corporation pursuant to Article XVI of the Stock Corporation Law, or for the sale of the franchises or the property of the corporation pursuant to Section 20 of the said law, but they shall be entitled to vote upon any proposition for the guaranteeing of bonds or obligations of any other corporation pursuant to Section 19 of the said law, and they shall be entitled to vote solely and as a class and to the exclusion of any other class of stock upon any proposition for the establishing of priorities or creating further preferences among the several classes of stock

pursuant to Section 36 of the said law. The holders of the preferred stock shall be entitled to vote upon any proposition for consolidation pursuant to Section 86 of the said law, but shall not be entitled to vote for any proposition for change of name of the corporation pursuant to the General Corporation Law, nor on the question or matter of [fol. 36] voluntary dissolution pursuant to Section 105 of the said Stock Corporation Law. They shall, however, be entitled to vote upon any proposition for increasing or decreasing the number of shares of preferred stock and the consent of the holders of two-thirds of the issued outstanding preferred stock shall be necessary and requisite upon any proposition to increase the total number of shares of outstanding preferred stock or to create any other class of preferred stock unless the proposition is to create a class of preferred stock which shall, in all respects, be subject, subordinate and secondary to the preferred stock herein specified. The holders of the aforesaid preferred stock shall at all times while it is outstanding, have the sole and exclusive right, as a class, to elect two of the five directors of the New Corporation. Said right to elect two of the five directors shall continue and remain wholly and solely with the preferred stock as long as the said preferred stock has not been entirely redeemed or retired and/or provision made for its redemption and retirement. Said right to elect two directors as aforesaid shall be subject to enlargement under the following circumstances: in the event that one Morris White shall not be elected president of the New Corporation, and/or being elected, shall fail to qualify as president of said New Corporation, and fail to continue to act as executive in general charge of the New Corporation's [fol. 37] affairs, then and in that event, from and after such date and until said Morris White shall again be elected as president of the said New Corporation and qualify as such president, and act and continue to act as its executive in general charge of its affairs, the said preferred stock shall have the sole and absolute right as a class, to elect three of the New Corporation's directors and from such date the common stock shall have the right to elect two and only two of such New Corporation's directors. Upon the redemption of the said preferred stock in toto and/or its retirement in toto, and/or the making of provision

therefor, all rights of the preferred stock of any kind, nature or description herein expressly granted, shall cease and lapse and all such rights shall be vested wholly and solely in the holders of the common stock.

The By-laws of the said New Corporation shall provide that so long as any of the promissory notes in this Offer referred to (to be issued by the said New Corporation), shall remain unpaid and no provision for the payment of all of them has been made, the Board of Directors shall have the sole and exclusive right to employ the executives of said corporation and to fix the amount of salary as to all such executives of the said New Corporation, and such action of said Board of Directors shall be concurred in by four of the five members of the said Board of Directors in [fol. 38] order to be a valid exercise of the powers of the said Board of Directors in that regard, and if feasible the Certificate of Incorporation of said New Corporation shall likewise contain a provision of similar effect.

The Certificate of Incorporation and the by-laws of the said New Corporation shall provide also that in the event of the death, resignation or inability to act of any of the directors of the said New Corporation, that the successor to such director's or directors' unexpired term shall be filled by the action of the stockholders of that class of stock which elected the director whose resignation, disability or disqualification caused or causes such vacancy.

The holders of the preferred shares shall be entitled to receive from the surplus or net profits of the corporation as and when declared by the Board of Directors non-cumulative dividends upon such shares at the rate of six per-cent. (6%) per annum, payable semi-annually in preference and priority to the declaration or payment of any dividend upon the common shares or upon any other shares that the corporation may hereafter issue. No dividends however shall be paid or declared on any class of stock unless and until the series of promissory notes (the last of which matures July, 1933) to be issued by the New Corporation simultaneously with the said stock, shall have been paid or provision made for the payment thereof by the corporation.

[fol. 39] No dividends shall be paid upon the common stock until all outstanding preferred stock shall have been redeemed or retired and /or provision made therefor.

It shall be mandatory upon the directors of the New Corporation to cause an audit of the affairs and the business of the corporation to be made each year by a firm of Certified Public Accountants of its selection. In the event that any such firm of Certified Public Accountants shall report that during any fiscal year ending after July 1st, 1933, there has been any net operating profits earned by the said corporation, that then and in that event, subject to the provisions of law applicable thereto, it shall be mandatory upon the directors of the said corporation to cause the corporation to apply one-third of the said earned net operating profits of the said corporation for said fiscal year to the redemption and/or retirement of the aforesaid preferred stock.

In computing "net profits" for all of the purposes hereof (a) all merchandise of the corporation shall be figured at cost or market, whichever is lower, (b) provision shall be made for payment of all taxes, depreciation, contingencies and depletion, (c) reasonable reserves shall be set up for losses on accounts receivable, (d) deduction shall be made for maintenance and all other necessary expenses in connection with the operation of the business.

[fol. 40] Said preferred stock shall be redeemable or retirable at par, plus any and all declared and unpaid dividends.

Whenever redemption or retirement of preferred stock is referred to herein, it means pro rata redemption and/or retirement, as the case may be, of all of such issued and outstanding stock; subject, however, to the right of the corporation upon such redemption and/or retirement to disregard all fractional requirements of such redemption and/or retirement.

Upon the dissolution of the corporation and/or the distribution of its assets, the holders of the preferred shares shall be paid in full the par value of the shares held by them plus any declared and unpaid dividends thereon before any amount shall be distributed among the holders of the common shares; on and after such payment to the holders of the preferred shares, the net remaining assets, if any, shall be distributed among the holders of the common shares.

The foregoing provisions enumerated under subdivision "1" hereof shall also be duly embodied in and become and remain part of the by-laws of the said corporation, in form

and substance satisfactory to Milton C. Weisman, counsel to the Creditors' Committee.

The said by-laws of the said corporation shall likewise provide that all of the officers and directors of the said cor-
[fol. 41] poration except those representing the Merchandise Creditors and the Bank Creditors (who shall not be so removable), shall be removable with or without cause by the majority vote of the holders and owners of the common capital stock of the said corporation.

The certificate of incorporation and by-laws of the New Corporation shall contain such additional clauses as may in the opinion of counsel for the Creditors' Committee and the New Corporation be deemed desirable to effectuate the purposes herein expressed or reasonably implied.

(2) Assign to said New Corporation all of the right, title and interest of the undersigned in and to this offer and all benefits thereunder.

(3) Cause the said New Corporation in consideration of the sale, assignment and transfer to it of all of the benefits of this offer, to assume all of the obligations of the undersigned under and by virtue of this offer and to execute and deliver at or before the delivery of the bills of sale to it hereunder to counsel to the Creditors' Committee, an instrument expressing such assumption, in form and substance satisfactory to said counsel.

(4) Cause the New Corporation, at or before the delivery of the bills of sale to it hereunder, to execute and deliver to all assignees of accounts receivable and the merchandise represented thereby, pursuant to assignments heretofore made by Morris White, Inc., an instrument or instruments in form satisfactory to such assignees, recognizing the
[fol. 42] validity of and assuming the performance of all of the terms and covenants of the instruments effecting said assignments, in so far as such terms and covenants may then be unperformed.

(5) Cause the New Corporation within 5 days after the signing of an order approving the acceptance of this offer by the United States District Court for the Southern District of New York,

(a) To pay in cash (or in notes, if acceptable to the person to whom same may be payable), any and all costs of administration of the business and properties of Morris White, Inc., by the Receiver in Equity herein, to such persons, including the Receiver, and in such amounts, as may be agreed upon with the New Corporation, or in the absence of such agreement, as the United States District Court for the Southern District of New York shall direct.

(b) To pay any and all liabilities and obligations incurred by the Receiver in Equity herein, in the performance of its duties as such Receiver, and/or in the course and conduct of the business of Morris White, Inc., and remaining unpaid by the Receiver, or in lieu thereof, cause the said New Corporation to furnish security in form and amount satisfactory to the Receiver, securing the payment of any and all such obligations.

[fol. 43] (c) To pay, or otherwise obtain a release or discharge or indemnity therefrom running to the Receiver, in form and substance satisfactory to the Receiver, any claims of the United States Government, the State of New York, and any and all other lien and/or preferred creditors of Morris White, Inc.

(d) To pay to the attorney for the Creditors' Committee a counsel fee in an amount to be agreed upon between him and the New Corporation.

(e) To make provision in the manner hereinafter provided, for the payment to each of the creditors of Morris White, Inc., as hereinafter defined, of one hundred percent. (100%) of the amount of the indebtedness allowed against said Morris White, Inc. in these receivership proceedings; twenty percent. (20%) thereof by its negotiable promissory notes and eighty percent. (80%) thereof by issuing to the said creditors, at par, its preferred stock. By "creditors of Morris White, Inc." is meant each and every creditor whose claim may be duly proved and allowed in said receivership proceedings. Said twenty percent. (20%) shall be payable in four equal installments of five per cent. each, to be evidenced as to each creditor by four non-interest bearing negotiable promissory notes to the order of each of the [fol. 44] said creditors, the first of which series of four

notes deliverable to each creditor shall be due January 2nd, 1932, the second of which shall be due July 2nd, 1932, the third of which shall be due January 2nd, 1933, and the fourth of which shall be due July 2nd, 1933. In the event of the default in the payment of any one or more of the aforesaid notes, and the continuation of such default for a period of twenty (20) days after notice of such default by registered mail to the New Corporation, all of the aforesaid notes remaining unpaid at the time of such default shall at the option of each holder, immediately become due and payable. Said notes and stocks shall be deliverable in the following manner: Annexed hereto, marked "Exhibit A," is a statement of Messrs. Klein, Hinds & Finke, Certified Public Accountants, setting forth the total liabilities of Morris White, Inc., as per its books, as of the date of the receivership; within the said 5 days hereinbefore mentioned, after the signing of an order approving the acceptance of this offer, the New Corporation will deliver to Michael Hollander, Esq., Chairman of Creditors' Committee, its four negotiable promissory notes, each note for five percent. (5%) of the total amount of indebtedness shown on "Exhibit A," the first of said notes payable January 2nd, 1932, [fol. 45] the second of said notes payable July 2nd, 1932, the third of said notes payable January 2nd, 1933, the fourth of said notes payable July 2nd, 1933, and will likewise deliver to Michael Hollander, a certificate for all of the New Corporation's authorized preferred stock, endorsed in blank for transfer.

Upon the entry of an order approving the acceptance of this offer, the Receiver will advertise for claims against Morris White, Inc. or take such other steps as it may be directed to take by the order of this Court, to be entered in that regard. Upon the termination of the period for filing claims, the Receiver shall deliver to the New Corporation and Michael Hollander and counsel to the Creditors' Committee a certificate showing the total amount of such claims filed, the names and addresses of all claimants and the amounts of their respective claims, and if the total amount shown upon the said certificate shall exceed the total amount shown upon "Exhibit A," the New Corporation shall within five days after such certificate shall have been delivered by it, deliver to the said Michael Hollander additional

similar notes as aforesaid (except as to amonut) for twenty percent. (20%) of the said excess and if the authorized preferred stock of the New Corporation shall be less than [fol. 46] eighty percent. of the total of such amount, it shall thereupon (said Hollander agreeing to consent thereto) duly cause its authorized preferred stock to be increased to an amount equal to eighty percent. (80%) of such claims filed and upon such increase becoming effective, forthwith deliver any and all additional authorized preferred stock to Michael Hollander for the uses and purposes herein recited. Upon the final determination of all claims, the Receiver shall furnish to the New Corporation, Michael Hollander and counsel to the Creditors' Committee, a certificate showing the total amount of all claims filed which were not objected to and also of all claims which, if objected to, were allowed, and the names and addresses of all claimants and the amounts of their respective claims not objected to, or if objected to, allowed. Thereupon, the New Corporation will deliver to Michael Hollander, for and to the order of each creditor whose claim shall have been allowed, its four notes aggregating twenty per cent. (20%) (i. e. five per cent. each as aforesaid) of such claim as finally determined, said notes payable as aforesaid. Upon delivery to said Hollander of all of said notes, he shall deliver back to the New Corporation the notes theretofore held by him, duly cancelled.

[fol. 47] The said Michael Hollander will also thereupon return to the New Corporation for cancellation so much of the preferred stock received by him as aforesaid as shall represent the excess in par value over and above eighty per cent (80%) of the total amount of the claims shown upon said Receiver's Certificate to not have been objected to, and of the claims shown thereon to have been allowed, if objected to. With regard to the balance of the said preferred stock, remaining in the hands of said Michael Hollander, he shall thereupon cause the same to be transferred into the names of two designees, as voting trustees, one of such designees to be designated by the members of the Creditors' Committee representing the merchandise creditors and the other such designee to be designated by the members of the Creditors' Committee representing the bank creditors. The said two designees shall hold said stock in

their names as voting trustees for the benefit of all of the creditors. The term of such voting trust shall be ten years. The said voting trustees shall forthwith issue voting trust certificates to the various creditors, such certificates to represent as to each creditor the number of shares of preferred stock at par as shall be equal to eighty per cent (80%) of his claim as shown upon said Receiver's Certifi- [fol. 48] cate. All of the terms of the voting trust agreement pursuant to which the said trustees shall act, shall be in form and substance satisfactory to counsel to the Creditors' Committee.

Said voting trustees shall forthwith cause the election to the Board of Directors of one member of the Creditors' Committee representing the merchandise creditors and one member of the Creditors' Committee representing the bank creditors and will thereafter, from year to year, and as the office of either or both of said directors may for any cause become vacant, elect a person representing like creditors to the said board. The voting trust agreement, and or the Certificate of Incorporation and/or By-laws of the New Corporation shall contain appropriate provisions, satisfactory to counsel for the Creditors' Committee, designed to carry into effect the foregoing provisions.

The New Corporation shall pay to Michael Hollander and/or the voting trustees all reasonable expenses of any nature that may be incurred by him or them or any of them in connection with the premises.

(f) To duly deliver, duly executed, any and all other instruments, contracts, assumptions, agreements herein referred to, or as may in the opinion of counsel to the [fol. 49] Creditors' Committee or counsel to the Receiver be deemed advisable and/or required pursuant hereto, all in form and substance satisfactory to them.

(g) To file a notice of appearance herein subjecting itself to the jurisdiction of this Court for the purpose of enforcing payment of the purchase price and the performance of the covenants of this offer by the New Corporation to be performed.

(h) To deliver to Michael Hollander as Chairman of the Creditors' Committee, an instrument in form and substance satisfactory to counsel for the Creditors' Committee,

wherein and whereby it shall agree, that in consideration of the acceptance of said promissory notes by the creditors of Morris White, Inc., the payment of such promissory notes shall not be anticipated in advance or their respective maturity dates unless any such anticipation shall be made in pro rata reduction of all notes of said maturity then outstanding, and the New Corporation shall further thereby agree that in the event the said New Corporation shall violate said covenant, all notes outstanding at the time of such anticipation shall immediately become due and payable at the separate option of each of the holders of such promissory notes.

Third. Upon compliance by the New Corporation with so much of the foregoing paragraph and its subdivisions [fol. 50] as are to be performed within 5 days after the signing of an order approving this offer and at or before the delivery of the bills of sale hereunder, the Receiver and Morris White, Inc., will deliver to the New Corporation their respective bills of sale of the assets sold pursuant hereto and pursuant to any order that may be entered hereon.

Fourth. The within offer contemplates the following to be done by the Receiver:

(1) The presentation of the within offer to the United States District Court for the Southern District of New York, and the approval of the acceptance of said offer by the Receiver and the entry of an order thereupon by the United States District Court for the Southern District of New York.

(2) The delivery by the Receiver of all of its right, title and interest in and to all of the assets required by this offer to be delivered by it, subject, however, to the retention by the Receiver of such assets as this Court and/or the Receiver shall then determine, to provide for such expenses of administration and obligations of the Receiver as may not otherwise be provided for by the New Corporation pursuant to any other provisions hereof.

[fol. 51] (3) The execution by the Receiver of any and all instruments of assignment and transfer and/or other papers or documents necessary to effectuate the transfer

of the Receiver's right, title and interest in and to said assets, business and property.

(4) The procurement by the Receiver of a bar order from the Court fixing and determining the right of creditors to file their claims within such time as the Court may set forth in such bar order, and forever barring any and all creditors, stockholders, persons, firms or corporations who shall not file their claims within the time limited therefor from asserting any claim against Morris White, Inc., and/or its assets.

Fifth. The New Corporation shall have the right to contest any claims filed against Morris White, Inc., and the expenses of any Special Master appointed by the Court or any other expenses incurred in connection with the contest of any claim or claims which may be filed against the estate herein or Morris White, Inc., or the Receiver, shall be deemed a part of the cost of administration and shall be paid or provided for in the manner hereinbefore provided for.

Sixth. It is further understood and agreed that the said [fol. 52] decree of the United States District Court for the Southern District of New York shall authorize and direct Morris White, Inc., by its officers, to join with the Receiver and/or otherwise, in any assignment, transfer or conveyance of any or all of the assets of Morris White, Inc. and/or of the Receiver in Equity of Morris White, Inc., and that for that purpose the injunction decree restraining any such sale, assignment or transfer shall be modified and vacated.

Seventh. It is further understood and agreed that the undersigned shall have the right to, and shall be obliged to, assign the rights and obligations of the undersigned under the terms of this offer, to the New Corporation, which New Corporation, when such assignment shall have been made, shall have all of the rights and obligations of the undersigned by virtue hereof.

Eighth. It is further understood and agreed and it is the intention of this offer that although the same is made in the name of the undersigned offeror, it shall be performed by and the benefits of the offer and/or contract received by the New Corporation.

Ninth. The Creditors' Committee herein referred to is the Committee selected at the meeting of creditors called [fol. 53] herein on April 14th, 1931, by the Receiver. Said Committee consists of Messrs. Hollander, Hausman, Jephson, Quigan, Bernheim, Survis, Rosenberg, Schoenfield and Weisman. Michael Hollander is Chairman of said Committee and Milton C. Weisman is Secretary and counsel to said Committee.

Tenth. In view of the imminent change in season affecting the operations of the defendant corporation and the loss of value of the assets purchased which will occur unless provision is made to promptly meet the requirements of the trade so that the benefits of the season may not be lost to the New Corporation, this offer is contingent upon the acceptance thereof on or before May 29th, 1931.

Dated New York, the 29th day of April, 1931.

Lily White. (L. S.)

[fol. 54] EXHIBIT A ANNEXED TO THE PETITION OF IRVING TRUST COMPANY UPON WHICH THE ORDER OF JUDGE KNOX WAS BASED REQUIRING CREDITORS TO SHOW CAUSE WHY THE OFFER MADE BY LILY WHITE TO PURCHASE ALL OF THE ASSETS OF MORRIS WHITE, INC., SHOULD NOT BE ACCEPTED, BEING A CERTIFICATE FROM THE ACCOUNTANTS STATING THE AMOUNT OF LIABILITIES OF THE DEFENDANT CORPORATION AS SHOWN UPON ITS BOOKS ON THE DAY OF THE APPOINTMENT OF THE RECEIVER

[Title omitted]

This is to certify that the amount of liabilities of the above defendant as shown upon its books on the date of the appointment of the Receiver herein is the sum of One Million Seventy-two Thousand and 30/100 Dollars ($1,072,000.30).

Dated New York, April, 29th, 1931.

Klein, Hinds & Finke, by Myron A. Finke.

[fol. 55] EXHIBIT 2 ANNEXED TO THE PETITION OF IRVING TRUST COMPANY UPON WHICH THE ORDER OF JUDGE KNOX WAS BASED REQUIRING CREDITORS TO SHOW CAUSE WHY THE OFFER MADE BY LILY WHITE TO PURCHASE ALL OF THE ASSETS OF MORRIS WHITE, INC., SHOULD NOT BE ACCEPTED, BEING A RESOLUTION OF THE CREDITORS' COMMITTEE APPROVING THE OFFER OF LILY WHITE

[Title omitted]

The undersigned, Chairman and Secretary respectively of the Creditors' Committee selected by the creditors of the defendant at a meeting of the creditors duly called by the Receiver, do hereby certify that the said Creditors' Committee at a meeting of the said Committee duly held on April 29th, 1931, duly adopted a Resolution in the following form:

Resolved, that this Committee as a Creditors' Committee of Morris White, Inc., selected by the creditors of said Morris White, Inc., at a meeting of the creditors called by the Receiver of the said Morris White, Inc., after due investigation and deliberation does hereby approve the [fol. 56] written offer made by Lily White, dated April 29th, 1931, and favors and recommends the acceptance thereof by the creditors of the said Morris White, Inc., and by the Court.

Dated New York, May 11th, 1931.

Michael Hollander, Chairman. Milton C. Weisman, Secretary.

[fol. 57] EXHIBIT 3 ANNEXED TO THE PETITION OF IRVING TRUST COMPANY UPON WHICH THE ORDER OF JUDGE KNOX WAS BASED REQUIRING CREDITORS TO SHOW CAUSE WHY THE OFFER MADE BY LILY WHITE TO PURCHASE ALL OF THE ASSETS OF MORRIS WHITE, INC., SHOULD NOT BE ACCEPTED, BEING AN INSTRUMENT DULY ACKNOWLEDGED BY MICHAEL HOLLANDER, CHAIRMAN OF THE CREDITORS' COMMITTEE, SUBMITTING HIMSELF TO THE SUMMARY JURISDICTION OF THE COURT

[Title omitted]

I, Michael Hollander, Chairman of the Creditors' Committee mentioned in the foregoing offer, do hereby subscribe my willingness, in the event that the Court shall approve the said offer, to undertake the matters therein referred to, to be undertaken by me, and do hereby submit to the summary jurisdiction of this Court with regard thereto.

Dated New York, May 11th, 1931.

Michael Hollander, Chairman.

[fol. 58] State of New York,
County of New York, ss:

On this 11th day of May, 1931, before me personally appeared Michael Hollander, to me known and known to me to be the person described in the foregoing instrument, and he thereupon duly acknowledged to me that he executed the same.

Nathan M. Friedman, Notary Public, New York County. New York County Clerk's No. 693, Reg. No. 3-F-457. Kings County Clerk's No. 548, Reg. No. 3294. Commission expires March 30, 1933.

[fol. 59] United States District Court for the Southern District of New York

[Title omitted]

Order Authorizing Receiver to Pay Judgment of Pfister & Vogel Leather Company—Dated May 14, 1931

This application having duly come on to be heard, and having been adjourned to April 21, 1931, and having been argued by counsel, and thereupon on consideration thereof, it is ordered, adjudged, and decreed as follows, viz:

Ordered, adjudged and decreed that said motion of Pfister & Vogel Leather Company to vacate the order herein dated April 6, 1931, insofar as said order enjoins the Sheriff of the County of New York from proceeding to execute the levy made by him upon the property of the defendant, Morris

White, Inc., under and pursuant to an execution issued in favor of Pfister & Vogel Leather Company on March 31, 1931 [fol. 60] upon a judgment rendered against said Morris White, Inc., in the sum of $25,036.26 and entered in the office of the Clerk of the County of New York on said day, be, and the same hereby is granted, and it is further

Ordered, adjudged and decreed that Pfister & Vogel Leather Company forbear in the enforcement of its legal rights and remedies under the judgment, execution and levy, and that the sum of $6,000.00 be paid to Lesser Brothers, as attorneys for Pfister & Vogel Leather Company, on the entry of this order, $3,000.00 to be paid on May 16, 1931, $3,000.00 to be paid on May 20, 1931 and $4,000.00 to be paid weekly thereafter by the receiver herein, out of the funds and assets of the estate herein available, to be applied on account of the aforesaid judgment and interest due thereon, and the fees, poundage and disbursements due to the Sheriff of the County of New York in connection with the execution and levy aforesaid, until said judgment and interest and said fees, poundage and disbursements of the Sheriff of the County of New York shall have been paid in full; if, however, any application is made for the dismissal or discontinuance of the above entitled action, prior to such dismissal or discontinuance, the balance remaining unpaid upon said judgment and interest and said fees, poundage and disbursements of the Sheriff of the County of New York shall immediately become due and shall be paid by the receiver out of the funds and assets of the estate herein available, prior to its discharge, excepting, however, that in the event that either a voluntary or an involuntary petition in bankruptcy be filed by or against the defendant herein, and an adjudication be [fol. 61] had thereunder, then as to only any balance then remaining unpaid and not due hereon, the rights of the respective parties shall not be prejudiced, and it is further

Ordered, adjudged and decreed that the rights, liens and claims of Pfister & Vogel Leather Company under the said judgment, execution and levy shall continue in full force and effect until the said judgment and interest and the said fees, poundage and disbursements of the Sheriff of the County of New York shall have been paid in full, and it is further

Ordered, adjudged and decreed that Pfister & Vogel Leather Company shall have the right, upon a default in the making of any of said payments, to proceed with the enforce-

ment of its rights and legal remedies under said judgment, execution and levy in the usual course, and it is further

Ordered, adjudged and decreed that Pfister & Vogel Leather Company, upon payment in full of the said judgment and interest and said fees, poundage and disbursements of the Sheriff of the County of New York, execute, or cause to be executed, a satisfaction of the aforesaid judgment upon payment thereof as above stated.

Jno. C. Knox, U. S. D. J.

[fol. 62] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MINUTES ON THE HEARING BEFORE JUDGE KNOX HELD ON MAY 8, 1931

Before Hon. Jno. C. Knox, D. J.

(Courtroom No. 2, Woolworth Building)

New York, May 8, 1931, at 4:30 P. M.

Appearances:

Irving Trust Company, Equity Receiver, by A. W. Copp, Esq.,

Olcott, Holmes, Glass, Paul & Havens, Esqrs., Attorneys for the Receiver, by Joseph Glass, Esq.,

Milton C. Weisman, Esq., Attorney for Creditors' Committee.

Nathan D. Stern, Esq., Attorney for Defendant.

Lesser Brothers, Esqrs., Attorneys for Pfister & Vogel, by Benjamin Lesser, Esq.

[fol. 63] Carter, Ledyard & Milburn, Esqs., representing Vincent Astor, by John P. Allee, Esq.

Baldwin, Hutchins & Todd, Esqs., John S. Wise, Esq., of counsel, Attorneys for Hermann Loewenstein.

Alexander P. Plaskow, Esq., representing attorneys for the National Safety Bank.

Mr. Glass: If it please your Honor, this matter is on today pursuant to the provisions of the original order ap-

pointing the Receiver in the Morris White, Inc. matter, the purpose being to discuss whether or not the receivership shall be made permanent.

Since the date of the appointment of the Receiver in this matter there have been continued negotiations on the part of the Creditors' Committee with the defendant and with representatives of the defendant who are interested in the purchase of the assets in connection with a proposed reorganization, and the matter has taken upon considerable time and it has finally crystallized in a proposed reorganization plan, which has been gotten only this afternoon into proof form ready to be sent to the printer and ready to be presented to your Honor probably tomorrow, or Monday at the latest, with a request that an order to show cause issue, addressed to the various parties in interest, to show cause why the plan, or any other plan that may be presented, should not be adopted.

[fol. 64] In view of that situation, and in view of the important bearing that consummation of any reorganization plan has upon the question as to whether this equity receivership shall be made permanent, I respectfully suggest to your Honor that this matter be postponed to a date subsequent to the return day which we shall ask your Honor to fix for a hearing upon the proposed reorganization.

The Court: Does anyone want to be heard on that suggestion of Mr. Glass?

(No response.)

The Court: How long do you think I should allow for consideration of this proposed plan of reorganization?

Mr. Glass: Well, I would say, your Honor, that in so far as the majority of creditors are concerned, and I think there is substantially—I know that there is substantially over 50 per cent of the creditors represented on the Creditors' Committee—their individual counsel have sat in on the meetings and they are fully familiar with the situation; there is desirability in the fixing of as early a date as possible, from several points of view. The Receiver does not want the responsibility of continuing this business any longer than it must have it. The proposed purchaser feels cramped by the restrictions of the receivership operation. Now, I would suggest to your Honor that a period of notice

not in excess of two weeks would be adequate, in view of the fact that the creditors are all within not more than one day's mail from New York City.

The Court: Do you want this hearing adjourned until after that adjourned date?

[fol. 65] Mr. Glass: Yes, if your Honor please; and we would ask, in that regard also, that your Honor fix a date—period of notice for the filing of claims, so that an appropriate bar order may be entered if the plan is consummated.

The Court: I do not think you had better try to have your return before the 1st of June. This is the 8th; that is about a little over three weeks.

Mr. Stern: We could get that notice, if the Court please, out to creditors certainly not later than Wednesday, Mr. Glass?

Mr. Glass: Well, if it should go to the printer tomorrow, it could be gotten out Monday.

Mr. Stern: Time is of the essence to the defendant here, because it is a seasonable business and we will lose the season if we don't get it out promptly.

The Court: This is the 8th day; that leaves only twenty-three days in this month anyhow, and you won't have your notice out before Monday. Put it down for the first week in June some time.

Mr. Stern: May I suggest, sir, that ten days' notice, instead of two weeks, would work the same result, certainly, as two weeks, and would make this——

The Court (interposing): That is pretty close time.

Mr. Stern: I don't want to press it, but it would make a difference in this situation.

Mr. Weisman: I might say, in that connection, your Honor, that the facts, aside from the legal form of the offer, have been known to the vast body of the creditors for exactly a week and two days already; so that in this case, the general terms of the offer have been known; but the delay that has ensued during the past week has been—[fol. 66] or nine days—has been due to the fact that counsel for the Creditors' Committee and counsel for the offerer and counsel for the Receiver and the individual counsel of various of the creditors had to be satisfied with regard to the form of the offer, the wording and so forth; and that

in the opinion of the Creditors' Committee it is very desirable that this matter, if it is to be consummated, be consummated with all reasonable, and not undue, despatch; and under those circumstances the Creditors' Committee does feel that ten days' notice would be ample, since the terms of it are known to most of the creditors already.

Mr. Glass: May I suggest to your Honor in that regard, that upon the return day, if ten days' notice is not deemed reasonable, that upon the return day, should there be any appearance on behalf of any creditor, any showing that the notice was too short, that at that time the matter might be adjourned?

The Court: Well, I would much prefer to have it long enough so that there would be no reasonable chance—when do you think you can get these notices out?

Mr. Glass: We can get the notices out by Monday, in case we can get them to the printer tonight.

The Court: I think you had better put it down two weeks from Monday, then.

Mr. Glass: Two weeks from Monday, your Honor?

The Court: Yes, I think you had better.

Mr. Glass: And returnable in this Courtroom, your Honor?

The Court: Yes; at about this hour, I guess.

Mr. Glass: Then does your Honor desire to make the adjourned date of this motion returnable contemporaneously?

[fol. 67] The Court: Yes, I think so—that is, as to whether the receivership should be made permanent?

Mr. Glass: Yes?

The Court: Yes. How much time do you think you had better fix for the filing of claims?

Mr. Glass: The present order that is entered grants three months from the notice. I do not see any substantial prejudice to the defendant or to the purchaser if a fairly reasonable notice is given there, because the transfer of title is not delayed by virtue of the time——

The Court: No, I should think not.

Mr. Glass: I should suggest, in that regard, sixty days, your Honor.

The Court: All right. Is that all?

Mr. Lesser: I don't know whether Mr. Glass is prepared to deal with the matter of the Pfister Vogel lien.

The Court: I think it had better be disposed of now.

Mr. Glass: The situation in that regard is this: We have taken that matter up with the Receiver and it is a matter of real concern to the purchaser more than the Receiver, because the terms of the proposed offer contemplate the current payment of $4,000 weekly. If this plan is consummated in two weeks, the most substantial portion of the judgment will be payable under the terms of the proposed stipulation, before the transfer of assets is made to the new corporation, and necessarily, the Receiver could only transfer subject to any liens of any lien creditors.

The Court: Have you paid anything on account of it yet?

Mr. Glass: We have not, your Honor.

[fol. 68] Mr. Lesser: Nothing.

Mr. Glass: Now, I have discussed the matter with Mr Stern this afternoon, and as I left it with Mr. Stern, Mr. Stern was going to communicate with Mr. Lesser—he did not know that Mr. Lesser was going to be here—and see if anything could be worked out for the continuing of these instalment payments after the transfer of the property, pursuant to the reorganization plan.

Mr. Stern: Judge Knox, as I see the situation now, Mr. Lesser has tendered a stipulation which provides for these instalment payments, and then provides that in the event of the reorganization, the balance of the debt shall immediately become due and payable. My thought in that regard is simply this: If this reorganization did not go through—I have said it frankly to Mr. Lesser—that there would be a bankruptcy petition filed and his lien will be dissolved, because it is within the four months' period. Now, if he is willing to stipulate that he take $4,000 a week until this amount is paid, I think it is reasonable to suppose that I will be able to prevail upon the client to the extent of having that done; but if this plan don't go through, there is no reason in the world why he should get a preference by reason of this.

Mr. Lesser: We have been all over that, Judge, so many times, and I am here——

Mr. Stern (interposing): But you have not with me, Mr. Lesser.

Mr. Lesser: Not with you, no, but I have been with the Receiver; I have met all the views of the Receiver and I

have prepared stipulation after stipulation, and the final one I understood was to be satisfactory, and here we are, as your Honor stated—wanted to know whether we have [fol. 69] been paid anything, and we have received nothing. I have not interfered with the Receiver; I have let him go ahead and conduct this business and the Sheriff has done nothing; and doesn't it seem fair that after the Receiver has agreed upon the thing and we have spent our time, hours discussing it, and we have got together on the stipulation, that it should be filed? That is the reason I came over here today; I thought the only way I could dispose of it was coming right before you, and here is our form of stipulation which I drew up, which is even a modification of the one I showed you before, and it was modified at the request of the attorneys for the Receiver——

Mr. Glass (interposing): May I say that the Receiver has taken the matter up with Mr. Christiansen and the view there is that the Receiver should not consent to this unless it be with the consent of the defendant corporation and the Creditors' Committee; and that is the reason why I took the matter up with Mr. Stern this afternoon prior to the hearing.

Mr. Lesser: We are not concerned with that situation; that situation will take care of itself when we reach it; but I have understood that this was agreeable—this is about the sixth stipulation we have drawn.

(After colloquy at counsel table, not heard by the reporter.)

Mr. Lesser: Another question of the amount to be paid after the Receiver steps out, that has to be taken up with my client——

Mr. Stern (interposing): There is the nub of the whole situation, if the Court please.

Mr. Lesser: If they had paid up the amount they agreed to pay, we would have had three-quarters of our claim paid by this time.

[fol. 70] Mr. Stern: You could not have it because they didn't have the money to pay it, number one. Number two, the difficulty of the situation is that the moment we get this reorganization plan in shape so that we can perfect it, then if Mr. Lesser acts again, as he has acted in the past, it is going to be a case of the man on the black horse: We

either have got to deliver something we have not got in cash, or the plan is going to fail. All I can say to Mr. Lesser is, that as a result of my conferences with the client, if this plan does not go through, he is not going to have the benefit of that lien; it is going to be dissolved in the Bankruptcy Court, if it does not go through.

Mr. Lesser: I am not so sure of that.

Mr. Stern: You are not so sure of that? Maybe you have some law that I don't know anything about. Generally speaking, that this lien is dissolved by a bankruptcy petition within four months. The lien was filed the 1st of April. We have still got plenty of time to dissolve it.

The Court: I think I will do something about this.

Mr. Lesser: Here we are, months later, I have not received a cent; and I think Mr. Glass will agree with me that I have done everything possible to assist the Receiver, to facilitate him, not to interfere, and do nothing; isn't that so?

Mr. Glass: That is so, sir.

Mr. Lesser: And here we are, month after month, first the Receiver and Receiver's counsel, then we are thrown back to Mr. Stern, as to whether the new organization is agreeable.

Mr. Glass: May I say to your Honor in that regard, if Mr. Lesser had heeded the suggestion we had made, he would have been much further now than he is. We did [fol. 71] suggest, without any commitment, that the disposition of the pending motion be held in suspense, and in the interim, with the consent of the Creditors' Committee and counsel for the defendant, weekly payments to be made in this very sum, and the entire question of Mr. Lesser's client's rights be left in suspense. He certainly would be in an excellent strategic position——

Mr. Lesser (interposing): I would have had $16,000. And a couple of weeks longer, I will have my claim paid in full, under their own statement of what I should have received; and because I have been decent and we have held off and done nothing—because I know what it means when a Sheriff goes in and starts a sale and begins to lot up—and I have been reasonable and I didn't want that done—I told you candidly, I did not want the Sheriff to go in and take the stuff out, because I know what that means, and the Receiver——

The Court (interposing): I think I will make some adjustment, or something of the kind.

Mr. Lesser: Now, what objection have you got to this order? Now, I am talking to the Receiver.

Mr. Stern: If the Court please, here is the situation: How is he any worse off? If he drives us hard enough, he is going to drive us into bankruptcy and he will destroy his own lien. If he will only ride with us for another two weeks, he will get all his money. In the meantime, the Receiver says "I will give you some money on account; I do not want to be committed to continue it."

Mr. Lesser: Judge, we are arguing the very question we argued when I first made my application and asked for [fol. 72] additional time to submit an affidavit; we are right where we were at that time; and now, after the Receiver has delayed this and delayed this until today, here we are now discussing it with the new organization——

Mr. Stern (interposing): No, Mr. Lesser——

Mr. Lesser (continuing): I think it is only fair to us that we take the situation as it is. We have an Equity Receiver here; we have a situation where I say that the rights of this judgment creditor must be protected by that Equity Receiver and our lien must be protected.

The Court: It is coming ahead of the equity proceeding; there is no doubt about that.

Mr. Lesser: Here we are where our rights should be protected, and the Receiver itself has delayed us and delayed us, until we are here, months later, and have nothing; and then they want to throw us over, back upon the debtor, or some concern that succeeds it.

Mr. Stern: No, we do not; that is not putting it correctly, Mr. Lesser. There is more than ample there to pay him 100 cents on the dollar; we have not interfered with it, and we could not interfere with it. Now we say to him: "If you give this plan a chance to be presented to the creditors, you are going to get 100 cents on the dollar. If you do not give it a chance to be presented to the creditors, you are going to muss your own nest, because we are going to be in bankruptcy."

Mr. Lesser: Oh, we were told that months ago; we have passed that months ago.

Mr. Stern: And during all this time we have struggled, and that work has resulted in this proposed plan, the work of half a dozen or more lawyers——

[fol. 73] Mr. Lesser (interposing): They have jockeyed me along to where I am out of Court and I am back again in the State Court proceeding. I say that is what I object to. I want my liens taken care of by this Receiver as he agreed to do.

The Court: I think that your plan of reorganization ought to provide that if it goes through, that some adequate provision be made to take care of any unpaid amount on this judgment at that time.

Mr. Stern: It does provide that, if the Court please.

Mr. Glass: The plan expressly provides, your Honor, that the Receiver transfer only his right, title and interest, subject to the rights of all preferred and lien creditors. Obviously, the Receiver could not transfer anything but that. But here is what appears to me as the reason I cannot fully understand sympathetically Mr. Lesser's point of view: It is perfectly obvious, from the date that has been fixed here, that three weeks must elapse before the plan is consummated. In three weeks, under the proposed arrangement, Mr. Lesser's client will receive approximately 50 per cent of its indebtedness. All of the creditors we believe are going to receive no cash, and they accept the reorganization on that basis. In three weeks Mr. Lesser's client will be paid 50 per cent in full; and then this Receiver cannot part with title to these assets except subject to Mr. Lesser's right to collect the balance at that time. And I will say this, talking for the Receiver: that certainly the Receiver is not going to part with any assets unless it is fully protected insofar as the rights of Mr. Lesser are concerned at that time. Now, it seems to me that the course that Mr. Lesser should follow as a practical matter is very obvious——

[fol. 74] Mr. Lesser (interposing): Well, you, or your office, told me that my stipulation was all right, and I sent it to you, the last one, with all these amendments; and that is the fourth stipulation I sent to you; and here I am jockeyed along, right down to this last minute——

The Court (interposing): I think they should either go into the bankruptcy matter now and try out the composition agreement, or else you ought to make some provision for the payment of this lien so that he will have his money when this thing goes through.

Mr. Lesser: That is all I want.

The Court: I think he ought to——

Mr. Lesser (interposing): And that is all that order provides for. In fact, we discussed with them certain clauses in there. They feared that the Receiver might be personally liable, and I put in clauses there that said it must be as to the available assets. They discussed the word "available." That is four days ago; and they said "That is O. K." and they told me the Trust Company were satisfied; and here we are, and we have not received anything.

The Court: I think I will do one or the other.

Mr. Lesser: If this is agreeable to you, let us submit the order to the Judge and——

Mr. Glass (interposing): The order in its present form?

Mr. Lesser: Yes; your firm said it was satisfactory.

Mr. Glass: I don't know who of my firm made that statement.

Mr. Lesser: Mr. Weiser did.

Mr. Weiser: I didn't say that to you, Mr. Lesser. I said I will take it up with the Receiver, in view of some objection to the clause they wanted to put in.

[fol. 75] Mr. Lesser: And didn't you call me up and tell me it was passed by the Receiver?

Mr. Weiser: No.

Mr. Lesser: I don't know who I am talking to—it is either the Receiver or somebody in the Receiver's employ, or the Creditors' Committee, or I don't know who—now I am thrown back to the attorney for the reorganization.

The Court: All I can say is, if your people want to set that judgment aside, file a petition in bankruptcy and go ahead.

Mr. Lesser: And we will fight it out there; I am satisfied.

The Court: Or else make some provision to take care of this, if this thing is going through.

Mr. Stern: That is the difficulty, Judge Knox——

The Court (interposing): I cannot do it—I assume that Mr. Lesser has something here. Now he is in equity; he is entitled to 100 cents on the dollar, and if you people are interested in it, want to avoid bankruptcy, why it is worth the price that you are asked to pay, I reckon.

Mr. Lesser: Why, Judge, the Receiver itself admits that it would have paid us up almost by this time.

Mr. Weisman: May it please your Honor, I represent the Creditors' Committee, and as it has been stated to your Honor, almost in excess of half of the creditors, in amount, are on that Creditors' Committee. Now, I cannot understand Mr. Lesser's——

The Court (interposing): I don't care whether you can understand it or not——

Mr. Weisman (interposing): I want to point out to your Honor that he is adequately protected——

The Court (interposing): I know, but he wants his money; I don't blame him, as far as that is concerned. [fol. 76] You must either fish, cut bait or go ashore. You are going to pay his judgment or else go into bankruptcy, and void it if you can.

Mr. Stern: What does your present stipulation provide, Mr. Lesser? I have not seen it.

Mr. Lesser: I have gone over and over all of it with the Receiver's counsel so often, I think we could almost read it by heart. The last item we had is as to "available assets." I told the Receiver I did not want them to be held personally liable; I said "All right; put in the word 'available,' ". We have not been antagonistic; we certainly have been trying to help it along as much as we could. If my client is satisfied, I am.

Mr. Stern: That is, perhaps, the best we can do, Judge Knox. As you say, we are hors de combat; we have got to take it or leave it. This gesture of being so generous, I know that Mr. Lesser won't perform, possibly because his client won't let him; because before this went into receivership, I tried to get him to wait, and while he is always amenable, his client is very obdurate.

The Court: I don't know what you have here in the way of assets or anything of the kind, but if you want to void the judgment, if you go into bankruptcy you probably can set it aside.

Mr. Stern: The reason we have not, sir, is because the vast majority of creditors, both in number and amount, did not want to go into bankruptcy and they are willing to pay the penalty.

The Court: Then they ought to go ahead and pay it.

Mr. Stern: That is right; but the difficulty is, the client has to pay it, and the cash is not available.

Mr. Glass: May I ask that Mr. Lesser and Mr. Stern confer——

[fol. 77] The Court: You had better confer. If you don't do something on this by Monday morning, you either pay this money or go into bankruptcy.

Mr. Stern: You don't mean pay it in full; you mean pay it in instalments?

The Court: Yes.

Mr. Stern: Well, I think that we can arrange it, Judge.

(Adjourned to Monday, May 25, 1931, at 4:30 P. M., Courtroom No. 2, Woolworth Building.)

MINUTES ON THE HEARING BEFORE JUDGE KNOX HELD ON MAY 25, 1931

[Title omitted]

Before Hon. Jno. C. Knox, D. J.

(Court-room #2, Woolworth Building)

New York, May 25th, 1931, at 4:30 P. M.

Appearances:

Olcott, Holmes, Glass, Paul & Havens, Esqs., Attorneys for Receiver and Complainant, by Jerome Weinstein, Esq.

There are no other appearances by any other counsel or creditors.

On motion of counsel for the Receiver, the hearing was adjourned to Tuesday, May 26, 1931, at 4:30 P. M., Court-room #2, Woolworth Building.

[fol. 78] MINUTES ON THE HEARING BEFORE JUDGE KNOX HELD ON MAY 26, 1931

[Title omitted]

Before Hon. Jno. C. Knox, D. J.

(Court-room #2, Woolworth Building)

New York, May 26th, 1931, at 4:30 P. M.

Present:

Olcott, Holmes, Glass, Paul & Havens, Esqrs., Attorneys for Irving Trust Company, Equity Receiver, by Joseph Glass, Esq.

Nathan D. Stern, Esq., Attorney for Defendant.

Max E. Sanders, Esq., Attorney for C. A. Auffmordt & Co.

O'Connell & Butler, Esqrs., Attorneys for G. Levor & Co., Inc.

Baldwin, Hutchins & Todd, Esqrs., Attorneys for Hermann Loewenstein, John S. Wise, Esq., of Counsel.

Charles F. White, Esq., Attorney for Ocean Accident Guarantee Corporation.

[fol. 79] Isidore Vise, Esq. (7 South Dearborn Street, Chicago, Ill.), Attorney for J. Greenbaum Tanning Company.

Marlow & Hines, Esqrs., Attorneys for B. Altman & Company, by Richard Lincoln, Esq.

Saul S. Myers, Esq., Attorney for Creditors; Charles H. Tuttle, Esq., of Counsel.

Milton C. Weisman, Esq., Attorney for Creditors' Committee.

George Z. Medalie, Esq., U. S. Attorney, by Morton Baum, Esq., Assistant U. S. Attorney.

General Co-nsul's Office, Washington, D. C., by Mr. Cash.

Bureau of Internal Revenue, by Mr. Sherriff.

Mr. Glass: Your Honor, this matter comes on for hearing pursuant to the conditions of the order signed by your Honor, requiring all parties interested to appear at this time and place, to show cause why a certain offer, dated April 29th of this year, for the purchase of the assets of the defendant here, should not be accepted, or why any

other offer that may be presented at this time should not be considered. The present offer, a copy of which has been sent to all creditors, who presumably are all familiar with the terms, has been filed. I will just briefly sketch the terms.

[fol. 80] The subject matter of the sale is the assets of the defendant company, and all of the right, title and interest of the Receiver in those assets. The purchase is subject to all existing assignments of accounts, and is also subject to the assumption of payment of the following obligations by the purchaser: First, the costs of administration; secondly, the liabilities of the Receiver; thirdly, the payment, or the procurement of the discharge of the Receiver from any liability with respect to Federal Taxes, and similarly with respect to New York taxes; and lastly, with respect to any lien creditors, there being one lien creditor, a judgment creditor. A further obligation is imposed on the purchaser of paying the fees of the counsel for the Creditors' Committee; and those are all the terms, other than the consideration flowing to the creditors.

The following are the considerations flowing to the creditors:

The plan contemplates the payment of creditors in full, in the following manner: 20 per cent of their claims, as allowed in this proceeding, in notes—four notes of 5 per cent each, payable at intervals of six months, commencing January 1st, 1932. The balance of their proved claims, to wit 80 per cent in preferred stock of a corporation to be organized, which corporation is to assume the obligations of the purchaser. I am not going into the details of the preferred stock. They are set out in detail in the order.

The offer further requires the new corporation to file its notice of appearance, subjecting itself to the summary jurisdiction of this Court, for the purpose of enforcing the terms of the offer.

That is a brief outline of the terms of the offer.

The Receiver is, of course, a neutral party to any plea, [fol. 81] and is not interested in the adoption of this plan, but is interested in the termination of the Receivership and its responsibility at the earliest moment possible, consistent with the consideration of the offer.

If there are any further questions on the part of creditors with respect to details of the plan, I would be glad to answer those questions.

The Court: What is the amount of the liabilities that are admitted, to the creditors?

Mr. Glass: The total liabilities are, pursuant to a certificate which is presented with the order to show cause, $1,072,000. That includes some $100,000, in round amount, of liabilities of the United States Government, for which a claim has been filed, and some $50,000——

Mr. Stern: $57,000.

Mr. Glass: —interest and penalties due to New York State.

The Court: They are preferred claims?

Mr. Glass: Yes.

The Court: What is the amount of the other preferred claims that the purchaser will have to discharge, if there is anything available for the notes and stock?

Mr. Glass: There is an obligation to one judgment creditor, on which there have been payments, and an unpaid balance due of the sum of $15,000. There is no further assumption of liability, except a claim is involved in the assumption of the existing agreements under which accounts have been assigned, the new corporation assuming those agreements which contemplates the carrying over the assignments into the new corporation.

The Court: Is the proposed purchaser to pay by cash, to pay administration costs, or is it coming out of the earnings [fol. 82] of the new corporation?

Mr. Glass: As I understand the situation, I do not believe the offer contemplates the introduction of any new cash, or new assets, into the new corporation. I do not believe that the offer contemplates anything further than this. There is a large unrealized, unmanufactured inventory, as I am advised by the Creditors' Committee, the large element of value which is preserved into the new corporation is the factor of management and experience in the conduct of the particular business by the present persons interested.

The Court: What is the amount of money borne by the new corporation for administration costs and preferred claims prior to the time which you mention, on account of those notes and stock?

Mr. Glass: The present situation in that regard, your Honor, is this: The Receiver has a present balance of $54,000 in cash, over and above its liabilties. It has $67,000 in free accounts receivable, and the practical equipment of cash. That will be in the corporate treasury, less a deduction of administration costs, that part of the costs which involve allowances.

The Court: Is there any estimate as to what these costs will be?

Mr. Glass: Nothing but a rough estimate, and I discussed it with the Receiver yesterday, and the figure is supposed to be approximately $50,000.

The Court: That is the Receiver's and counsel fee, and all?

Mr. Glass: The immediate charge against the preferred stock against the new estate will be $100,000, tax liability to the Government. The representatives of the Government are here prepared to consent to the acceptance of this offer [fol. 83] upon condition that the new company assumes the debt, and also I understand to the instalment settlement of the debt on rather liberal terms, stretching over a period of time.

The Court: If these properties of the defendant were put up at auction and sold, have you any idea as what might be realized in the form of cash?

Mr. Glass: That will be exceedingly difficult to estimate on account of the nature of the assets. The finished merchandise on hand at the present time, as well as the prices that is about $100,000, if sold in the regular course of business. The raw material value, as a going business, will approximate $300,000. What it would realize on a forced sale is a difficult matter for the Receiver, or any one else, to say; leathers, miscellaneous ornaments, and so forth. The experience of the Receiver up to this time has been that prices have been during the Receivership administration, falling.

The Court: And are liable to fall still further, I imagine. What is the percentage of claims represented by those who form the Creditors' Committee?

Mr. Glass: Approximately $589,000, of $1,072,000. Those figures are approximate.

The Court: And the Creditors' Committee, I understand, favors the reorganization along the lines you suggest?

Mr. Glass: The Creditors' Committee is responsible for the promulgation of the reorganization plan.

The Court: What percentage of the remaining creditors have agreed to the plan?

Mr. Glass: That is a matter I am in no position now to make a statement. I understand a large majority of the [fol. 84] creditors are present, and will be represented at present.

Mr. Tuttle: I represent certain creditors who are opposed to this offer. At the proper moment, I would like to be heard.

The Court: You may go ahead. I will have to leave, as I find I have another appointment, but I can stay for the next 25 minutes.

Mr. Tuttle: I will curtail myself, all right. I represent the National Surety Company, the Indemnity Company, the Ocean Guaranty and Accident Company and the J. Greenbaum Tanning Company, and I am told they have claims of approximately $125,000.

This offer is opposed on a number of grounds. In the first place there is no intelligent statement presented for its consideration, by the moving papers. All we have here presented in the papers is an estimate made by certain accountants, as of April 6th, which at the time the corporation entered into the Receivership, liabilities are stated to be $1,072,000. There is no estimate of the assets; there is no estimate of the expenses; there is nothing to indicate how much may or may not be realized, although the Receivership has been proceeding for over a month and a half. There is no statement concerning the result of the Receivership, how much has been received, how much has been sold, how much has been ascertained in the way of debts; indeed, there is not even a schedule of liabilities attached here.

There has come into my possession a statement prepared by an accountant, as of April 6th, 1931. This statement of course is not a statement of the affairs as found by the Court in the Receivership, and it is interesting to observe [fol. 85] that the current liabilities are here stated as $1,050,000, of which out of the three principal items, two are notes payable to the banks, notes payable to the banks that are secured, amounting to $179,000, and are secured out of the accounts receivable to the extent of $251,000; and notes payable to the banks unsecured, to the extent of $262,000,

making, as your Honor will perceive, something like $450,000 due to the banks, the major portion of the amount stated by the gentleman who has just spoken.

It is therefore easy to see that the banks which make up the major portion of the claims in favor of this settlement, would be in favor of it.

When we turn to the assets side of it, we find that there are accounts receivable to the extent of $301,000, of which you will perceive all but $50,000 has been eliminated by accounts pledged to the banks. The rest of the assets are entirely negligible. The cash on hand is practically only $5,000, and certain merchandise inventories. Those inventories are stated at the figure of $1,241,000. The truth about them was stated. After the meeting, the second meeting of the Committee, at which this certain matter was considered,—and I have a memorandum made by one of the persons who was present representing, I think the National Surety Company itself, of which I will just read an extract: After a lengthy discussion, and after two meetings, the Committee has decided that the total amount realizable, and in face of litigation, of all the assets, both current and total, would be the sum of $182,000—not enough, of course, to, or barely enough to pay off the secured liabilities to the banks. And in addition to that——

The Court: Does that mean that the realization would include the collateral pledged at the banks?

[fol. 86] Mr. Tuttle: That is the way I understand it.

Mr. Glass: That is erroneous.

Mr. Tuttle: If it is, I am glad to be corrected in respect to the matter, but I read what is stated. Here is a memorandum made at the time by a person who was there, that the total amount realizable for any debts remaining of all the assets, would be that sum.

In addition let me call your Honor's attention to the fact that this same statement as of April 6th, 1931, by counsel employed as counsel for the Receiver, states that the Federal Income tax amounts to $80,000, the New York State Franchise tax $57,000. There is due to employees $3,000, accrued payroll of $15,000; all of which, I suppose, will be entitled to preferences, an amount which would nearly absorb the amount stated to be the total amount realizable at this time.

Now let us turn around this proposition to see what it really is, because it is, in essence, nothing at all except a proposition to buy this Court's Jurisdiction, and these creditors control, which are at the present time about to continue that control, in the hands of the existing management, which has brought about the bankruptcy here, which is nearly 100 per cent. As I look at the figures and the terms of this offer, I cannot understand how the channel of administration here happens to be a Receivership, and not a bankruptcy. Indeed the creditors are entitled to an examination under Section 21-A, to find out how this kind of assets has come about.

Now turn to the proposal which is presented, as I think to your Honor, without any figures from the offices of the Receiver at all, without anything from which anybody can [fol. 87] form a judgment, and your Honor, perhaps the statement as received, is no answer. The offer is from one Louise White, who I understand is the wife of Morris White. She does not set forth that she has any financial responsibility whatever. She proposes to organize a new corporation. The corporation has no assets and no capital. That corporation is to be controlled by a board of directors, of which it is said that the creditors are to have two out of a minimum of five. There is to be a capitalization of 10,000 shares, of which 1,000 is to be common stock, without par value. It stated that stock is to be disposed of for such consideration and purposes as the board of directors will elect. And it is to have the sole voting power; in other words, that common stock which is to have the sole voting power, and to have the control of this corporation, is by a board of directors controlled by representatives of the past management and the prior stockholders of the existing corporation, in effect.

Now, when it comes down to what may be done by the board of directors, let me call your Honor's attention to this: It says that the holders of the common stock shall have (1) the sole and exclusive right to vote for any purposes, any corporate purposes; and if that be not enough to strip these creditors of any control, it says that the preferred stock, as stockholders, shall not be entitled to vote on any question of increase or decrease of common capital stock, nor the right to vote for any directors, except—note this language—to vote for directors who by the certificate of

incorporation of the new corporation—a certificate which is not presented to your Honor—are at any time to be [fol. 88] elected by the holders of the preferred stock, nor shall they be entitled to vote on anything concerning mortgaging the property, and/or franchises of the corporation, or for the sale of the franchise or the property of the corporation. They shall not be entitled to vote for any proposition for exchange of name, nor any question nor matter of voluntary dissolution, under Section 105 of the said Corporation Law. And it is further specified that the directors shall have the exclusive and sole right to employ and choose any such corporation, and fix the amount of its salary, and of such executives of the new corporation.

Mr. Stern: There are about four out of five——

The Court: Go ahead.

Mr. Tuttle (reading a short extract): What are the creditors to receive? They are to receive four notes, each for 5 per cent of their claims, payable without interest, the first is payable in January of next year, and each of the succeeding three notes is payable in a series of six months thereafter. They are also to receive 80 per cent of their claims in preferred stock of this corporation.

Your Honor will perceive, therefore, that not a nickel in cash, or nothing which is the equivalent of cash at the present time, is being tendered. They are being paid in paper, only 20 per cent of which even expresses an obligation, and that obligation rests in a corporation which is what? I ask what that corporation is? The answer must be forthcoming from these papers. There is not a line or syllable which shows what the assets are worth. We may have names, when they say the property is a going concern, but what is it, and what is it worth? Why should the [fol. 89] creditors be called upon to even consider it at the present time? I cannot see that there is anything before the Court, and I cannot conceive that the Court will regard compelling the creditors to accept such a proposition as this.

The Court: What do you think might be had out of it if a liquidation takes place?

Mr. Tuttle: That is a question I cannot answer. There is nothing here on which to answer it, and that is the reason why I was——

The Court: As far as I can see, outside of the assets to which Mr. Glass refers, namely, the cash in hand and the finished merchandise and the stock of raw material that may be on hand, there is nothing but good will and the ability of Mr. White, if he is to continue in the management, to carry on.

Mr. Stern: That is correct.

Mr. Glass: I do not rise to take issue with Mr. Tuttle as to the merits of the plan, but simply to correct certain misconceptions as to the plan. Mr. Tuttle is unfortunate in the fact that he is entering the picture at a rather late date, and therefore he has not attended previous meetings at which frank discussion was had, and which has prepared the Receiver and the creditors. In a very short time after the Receiver was appointed, a meeting of all the creditors was called. The very balance sheet which Mr. Tuttle refers to was presented by myself personally, on behalf of the Receiver. The assets were commented on, purely out of the liabilities; a statement was made and sent to each one, of the views of the Receiver with respect to the collectibility value, and the facts have been presented. It was at that meeting that the Creditors' Committee was formed. That Committee consists of nine representatives, I think, only two of [fol. 90] whom represent banks, and the remaining seven represent the largest creditors.

The Court: Who are they? The names of the creditors who have assented and are represented on the Creditors' Committee?

Mr. Stern: Mr. Michael Hollander represents one of the New Jersey banks to the extent of $145,000. Mr. Jephson, who represents the Textile Banking Corporation, that is a merchandise creditor, and a number of creditors. Mr. Weisman, representing the bank; Mr. Rosenberg, who represents one of the creditors here, the Artistic Weaving Company, who is a creditor for—Mr. Rosenfeld, for $33,000, representing the Rex Novelty Works; George Bernheim, representing a creditor for $42,000 and over; Jack Schoenfeld, representing the Artistic Wire Company, a creditor to the extent of $30,500; Mr. Quigan, a creditor for $14,000 and over; Dan Hausman and N. Hausman, creditors for $20,000; Mr. Jephson, a creditor for $40,000. Those claims total about $500,000.

The Court: Excluding the banks?

Mr. Stern: The banks claims are $250,000, in round figures. So you have over $300,000 of merchandise creditors, and slightly less than $300,000 of bank creditors who are on this Committee, who did this work.

Mr. Tuttle: May I rise?

Mr. Stern: I did not mean to interrupt, Mr. Tuttle.

Mr. Tuttle: I welcome any interruption that adds to my enlightenment, or that of the Court.

I would like to know if the Creditors' Committee was formed before the bill in equity was filed?

Mr. Stern: The Receiver called a general meeting of creditors at the assembly room in this building, the Merchants [fol. 91] Association. At that meeting a resolution was adopted that a Creditors' Committee be appointed. One suggestion was five, then another was seven, and another was nine. Those men were nominated by the body of creditors there assembled, which represents practically all the creditors as nominated at the meeting, presented to the meeting, and by the presiding officer, which motion specifically mentioned those men as members of the Committee.

Mr. Sanders: I appear for C. A. Auffmordt & Company. The facts stated by Mr. Stern are absolutely correct. A Committee was formed before the general meeting, and the Committee was approved at the meeting——

Mr. Stern: You are wrong. I was there, and you were not.

Mr. Tuttle: Probably I am throwing an apple of discord into that matter.

Mr. Weisman: I am counsel for the Creditors' Committee. This Creditors' Committee was neither formed, nor discussed, nor arranged at any time prior to the Equity Receivership. It was formed and made up at a meeting called by the Receiver.

A Voice: May I ask Mr. Weisman, why was the Committee appointed on that day?

Mr. Weisman: Prior to this Receivership there was a Committee, some of whose members succeeded to the Committee——

The Court: How many of them succeeded?

Mr. Weisman: There were only three on the Committee. An Equity Receivership was planned at the time it was attempted to discuss this thing, by a Committee consisting of

two representatives of the banks, and three representatives of the merchandise creditors.

Mr. Tuttle: May I make this one point: What we want, these creditors whom I represent, is a fair opportunity to [fol. 92] examine, under oath, the people who have appeared, about this complete 100 per cent financial bankruptcy. We do not want to have any proposed offer of settlement put over on us by any group, large or small. That is why we are opposing this. How about the assets? What is the suggestion by means of which we can know what is really being done here. We are asked to take a pig in a poke, and a big pig. I ask for an opportunity to examine, before it is finally concluded, under oath, the members of the Committee. I would like to find out why it is that the several large financial institutions here are willing to take this pig. I would like to find out what side agreements there are in the consideration, to even make possible such a consideration.

Mr. Stern: That is the last thing we ought to be told of, and do not——

Mr. Tuttle: It is probably because——

Mr. Stern: Now, may I be heard——

The Court: I don't think we can hear you. I think we will put this over until tomorrow morning, at half past ten.

Mr. Tuttle: At half past ten I believe I have to put my client on the witness-stand. If your Honor will make it after Court, I will be happy to attend.

The Court: I cannot do that. I have tomorrow free, practically the whole day.

A Voice: And at 10.30 I have an examination of witnesses.

The Court: They will have to wait. I am sorry.

Mr. Tuttle: Will your Honor make it 10 o'clock?

The Court: Yes, I will make it at 10 o'clock.

Adjourned to Wednesday, May 27th, 1931, at 10 A. M.

[fol. 93] MINUTES ON THE HEARING BEFORE JUDGE KNOX HELD ON MAY 27, 1931

[Title omitted]

Before Hon. Jno. C. Knox, D. J.

(Court-room #2, Woolworth Building)

New York, May 27th, 1931, at 10 A. M.

Present:

Irving Trust Company, Equity Receiver, by A. Christiansen, Esq.

Olcott, Holmes, Glass, Paul & Havens, Esqrs., Attorneys for the Receiver, by Joseph Glass, Esq.

Milton C. Weisman, Esq., Attorney for Creditors' Committee.

Nathan D. Stern, Esq., Attorney for Defendant.

Charles H. Tuttle, Esq., representing National Surety, American Credit Indemnity (and another Surety Company).

Joseph K. Guerin, Esq. (also representing above Surety Companies).

Baldwin, Hutchins & Todd, Esqrs., Mr. Wise, of Counsel, representing Hermann Loewenstein.

[fol. 94] O'Connell & Butler, Esqrs., representing G. Levor & Co., Inc., by Raymond O'Connell, Esq.

Isidore Vise, Esq., representing J. Greenebaum Tanning Company of Chicago.

Archibald Palmer, Esq., representing V. S. & M. W. Snyder, Inc., of Boston, Mass.

George Z. Medalie, Esq., U. S. Attorney, representing U. S. (Tax claim), by Morton Baum, Esq., Assistant U. S. Attorney.

The Court: Now, gentlemen, you may proceed.

Mr. Tuttle: I have an affidavit on the way here; I would like to read it to the Court when it arrives. Until then I have nothing further except to say that I want to correct the appearance which I gave yesterday. I am appearing here today only for the three surety companies which I named.

Mr. Vise: May it please the Court, I represent the J. Greenbaum Tanning Company, and it was through no fault of Mr. Tuttle but entirely my blame that there was that confusion. And while I am at it, if I may have about two minutes, I would like to express our attitude in the matter. Mr. Tuttle yesterday, I believe, in his statement objected to the language of the offer. Of course, to correct [fol. 95] the language in any offer or decree is not going to successfully make money for the creditors in a reorganization like this. It will take more than that. And I believe, in listing the assets of the corporation, there is one that may never appear, and that is the ability of the individual. This particular business, as I understand it, is more than a business of buying and selling of merchandise; it involves creative talent, and I believe that Morris White has a great deal of creative talent which can be utilized; and Mr. Tuttle in his argument yesterday objected to the management—the continued management of the business by the same parties. Now, I believe that there should be an amendment to the particular order and decree, providing that Morris White should consent to an injunction, if you please, so that the creditors will have the benefit of his services for a limited time. I think before anybody should come in here and criticise a proposition that is submitted—I think we are in the position of the two characters in Bruce Bairnsfather's cartoons of "The Better 'Ole"; that none of us like the hole we are in now, but before any of us criticises the proposition, let somebody find a "better 'ole."

Mr. Wise: Your Honor, I represent Hermann Loewenstein, who has a claim against this company for some $5600. I simply want to say that we concur in what Mr. Tuttle has said heretofore. It does not seem to me an examination of this offer will disclose any proper method of financing this new company. The offer to purchase or to take over the stock—common stock of 1,000 shares, makes no provision for what shall be paid for it, nor is anything said in the offer as to the method of payment for that common stock. [fol. 96] The second thing that we do not agree with at all is that Mr. Morris White is necessarily competent to manage this business. We may be completely out of step with everyone else; but a man who has run two corporations and

driven both of them into the position that these two corporations now are, it hardly seems that the creditors should be asked to come in and to throw everything they have into his hands. And the second thing is, that one of the primary assets listed on that statement as of April the 6th, is a note for $1,700,000; and in an examination of the figures I can find no record of how that came into the corporation or of any security having been taken for it. I think that is evidence of gross mismanagement in the corporation, in which it probably will be conceded that there has been mismanagement.

The Court: What would you suggest be done?

Mr. Wise: We want to liquidate this now, sir.

The Court: Do you think there would be any return whatever to the creditors, from what has been shown here, assuming the facts as disclosed on this hearing are correct?

Mr. Wise: I do not think that there will be any great amount, but certainly, taking the figures, they list there assets of $1,400,000; certainly we ought to be able to get something out of that. Now, that statement as of April 6 has been proven, I think it will be accepted now, as not being anywhere near correct; but nevertheless, there must have been something behind it.

The Court: Have you got a statement there that shows the assets?

Mr. Weisman: Absolutely (submitting to the Court).

[fol. 97] The Court: Well, this says: Manufactured stock, $508,000. That is a good deal more than you suggested yesterday as the value of the stock.

Mr. Glass: In so far as the figures given yesterday, your Honor, let me indicate how the figures were arrived at. The figures you have before you are the accountants' figures taken off as at the date of receivership. Immediately following the appointment of the Receiver, the Receiver called together the creditors, and the Creditors' Committee that was yesterday named, was appointed. That Creditors' Committee met and appointed a sub-Committee for the purpose of appraising the assets, including the inventory. On that sub-Committee was Mr. Hausman, in the cotton and rayon business, a creditor in the sum of $19,000; Mr. Quigan, in the leather business, a creditor in the sum of

$14,000; Mr. Bernheim, in the leather business, a creditor in the sum of $42,000; Mr. Rosenberg, in the ornament business, a creditor in the sum of $32,000, and Mr. Schoenfeld, in the frame business, a creditor in the sum of $30,000. These creditors are entirely merchandise creditors and are totally unsecured in so far as the defendant corporation is concerned. They are the creditors who sold the substantial part of the inventory to the defendant.

They immediately met and appraised the estate; and they appraised it in a set-up of three columns. One, a column showing the figures appearing on the accountants' balance sheet; another, a column indicating what a forced sale would bring; and a third, indicating the value of the merchandise on a continuing business basis.

That first column showed, for finished merchandise, $508,000. The liquidation sale on that showed $207,000. [fol. 98] The value of that merchandise on a going concern basis was shown at $325,000.

The unfinished merchandise would show the greatest shrinkage. For instance, leathers were listed in that accountants' inventory at $316,000. On a liquidation sale, they were cut down by these leather merchants to $75,000. On a continuing business basis they were cut down to $255,000. Similarly with frames; the frames for the bags. The accountants' figures showed $161,000. The liquidation sale showed $25,000. The value of the merchandise as a going concern, $80,000. And so on, down the line; with the net result that the total finished and unfinished of $1,249,000, shown by the accountants, was estimated to realize $357,000 on Receiver's sales in liquidation, and $717,000 on a going concern basis.

Mr. Tuttle: I would like the privilege of saying a word to the Court before I leave, if there is no objection. My position is exactly as I stated it yesterday: that the clients that I represent are opposed to this offer that has been suggested here, because there is, in these papers, nothing stated on which they can form any judgment at all, and the offer, as it stands is, in their judgment, simply—now, what I desire is an opportunity, such as we would have, in view of the fact that this is a bankruptcy, that we would have under the Bankruptcy Law, to proceed with the examination. It can be done immediately and promptly; it can develop the full facts. I do not know why we should

have to surrender blindly, claims that we might have against people, if there are such claims, because of this complete bankruptcy. I think this is a case where there should be an opportunity for creditors who are not members of the Committee, to obtain all the light possible.

[fol. 99] The Court: They can examine him, if they care to—I can take the testimony here or I can appoint a Master to take testimony——

Mr. Tuttle: I will be very glad to do that at such time as your Honor may fix. Of course, I could not do it this morning. And I would like the privilege of submitting to the Court, if I may, today or tomorrow, some affidavits which will state our position fully; I have some of them here, but I have not them all.

The Court: Well, when will you be prepared to present such examination that you may care to?

Mr. Tuttle: Any time that your Honor fixes, after tomorrow. As I have stated, I am in this criminal case and my own client is going on the stand this morning.

The Court: And he is liable to be there for three or four days, isn't he?

Mr. Tuttle: Possibly; but that does not depend upon me. I would, of course, a great deal prefer that it would be done next week, Saturday being a holiday. I do not wish to hold anything up at all.

Mr. Stern: Except that I assume it would have to be several days, and so far as this case is concerned, we are very nearly late in catching the present season in this business and——

Mr. Tuttle: The Receiver is authorized to continue the business——

Mr. Stern: The Receiver has already issued $25,000 worth of certificates and has no desire to issue any more, and we have got to get actively behind the business if we are going to accomplish what we hope to accomplish by this proposition.

Mr. Glass: May I just say in reply to the criticism, or rather, the expressed criticism of Mr. Tuttle on the moving [fol. 100] papers. I do not know of any such moving papers in connection with any New York reorganization plan that sets forth anything more than that outlined in the plan. Notices were sent out two weeks ago. Not one inquiry came from Mr. Tuttle's office to the Receiver nor

to the Receiver's counsel, seeking to elicit the facts. Now, this is a rather late date to appear and claim insufficiency in the moving papers. The moving papers generally apprise the creditors of the situation. Certainly it would be impossible for the Receiver in any complex situation such as this to present in complete detail a situation which necessarily is involved.

Mr. Tuttle: I do not believe I have to add anything to what I have said yesterday; and certainly there is no time. We have to consider, and the Court has to consider this proposition on the basis of what is set forth in the moving papers. I would like therefore to ask your Honor's permission to file my affidavits tomorrow; and if your Honor feels that you can grant my application for a hearing in this matter so far as the examination is concerned I should certainly prefer that some time next week.

Mr. Palmer: There is a question, if your Honor please, in connection with Mr. Tuttle's opposition, whether or not he actually represents creditors in this case. Mr. Tuttle said yesterday he represented three insurance companies. The insurance companies, I do not believe at this time, can possibly be creditors here in this case. As far as the clients of Mr. Tuttle are concerned, have they yet paid a dollar to anybody? I think that should be determined before Mr. Tuttle's position at all comes into existence as to what may be done in an examination which I think is entirely outside the Court's province——

[fol. 101] The Court: What is outside of the Court's province?

Mr. Palmer: Of the Court's province, to determine whether or not Mr. Tuttle can examine, until he finds out whether he represents creditors who are actually in this case——

Mr. Tuttle: I can cut that short, because one of them has already paid $14,000. Now I am afraid I must leave, your Honor.

Mr. Stern: If the Court please, I don't know whether any other creditor should be heard before I should be heard——

The Court: Is there anyone else who wishes to be heard against this plan?

Mr. O'Connell: I would like to say a word.

The Court: Who do you represent?

Mr. O'Connell: Raymond O'Connell; I represent G. Levor & Company, a creditor to the extent of about $4500 on merchandise account, in April of this year.

The Court: Before or after the receivership?

Mr. O'Connell: Immediately before, on a claim——

Mr. Stern: They are not preferred, Judge.

Mr. O'Connell: We wish to go on record as strenuously opposing this suggested reorganization. The idea appeals to me and my client as being preposterous. The only effect I can possibly see that it has is to strip out the assets, what little there are remaining, and turn them over to the very people who have brought the creditors into this situation. That is going to be the net effect of the reorganization. They are going to have full control, under their Creditors' Committee, with Mr. Morris White as President, obviously, to do with what they will. Now they can very readily do [fol. 102] this. In the first place, the creditors lose all control over any payments to be made for the costs of the receivership; which, in my mind, is not only a vicious thing, but is a dangerous thing to the creditors. That is a matter that should be passed upon by the Court. In the second place, these people could keep this concern going and draw down in its entirety all the assets of the corporation in the form of salaries, and the creditors will be 1,000 per cent. worse off than they are now. Now, there is absolutely no argument in favor—there is nothing that appeals to the creditors and there is no insurance that he is getting one five-cent piece. The effect of such an offer is merely to encourage other people to go broke, as it were, and make money by doing so; and we wish to be strenuously noted as being opposed to this plan.

Mr. Stern: May I say to your Honor in that connection that Levor & Company, as I understand it, are insured by the National Surety. In other words, when that lawsuit was tried, the National Surety's counsel represented the Levor people in the contest and trial in the Supreme Court.

Mr. O'Connell: That is not correct, sir. The counsel that represented them was independent counsel, paid for independently by G. Levor & Company; and there is no assurance one way or the other that G. Levor & Company is pro-

tected in the event that they are not paid here. The surety company has denied any responsibility.

Mr. Wise: Your Honor, there has been a good deal of doubt thrown upon the different claims asserted. There are and can be none against Hermann Loewenstein's claim. [fol. 103] He has a claim against this estate for $5600. I do not know whether it is proper at this time to set up, interpose the idea that this Creditors' Committee is not representative of the creditors; it does not represent either the majority in amount nor in number, as I understand it; and I have been at some pains to find that out. This whole reorganization is predicated upon the assumption that a man who could drive two corporations into bankruptcy within six months of each other is capable and competent to take over and continue the running of another company and to make it a going concern. They say that the only way that this business can be carried on and to make something out of it is to put Mr. Morris White at the head of it and to give him practically unlimited control. And we say that we are not in accord with any such idea. It is making them take securities which are not cumulative, in a faint hope that eventually this corporation will be worth something; and they give us 20 cents on the dollar in promissory notes which are payable six months and a year from now, and a year and a half and two years from now. There is no proper set-up before this Court, nor can I, as I see it, understand an offer of re-financing of this company—they do not come in here and say that they are going to put up any cash. They assume that the business will carry itself, or that by continuing in the business they will get cash from one hand to put it into the other; and we wish to be noted as absolutely objecting to this reorganization plan.

A Voice: May it please the Court, I represent Vincent Astor, the landlord of the premises on which this business [fol. 104] has been conducted. Mr. Astor is not a member of the Creditors' Committee, and his claim is not listed among those with the Creditors' Committee. His claim is $47,000 odd. We have known Mr. Morris White for a great many years, and I say to the Court that we have confidence in his ability to come back. He built up a business from practically, as I understand it, nothing, to a position which in this handbag business is probably second to none in this country, and he had made a great deal of money. But, as

far as the handbag business is concerned, he ran up against the depression and also he exercised bad judgment, I suppose, in trying to expand and going into the Stock Market and the real estate field. But the fact remains that he has made this business and he has a great deal of ability; I mean, he has demonstrated it. My client feels that the only hope of the creditors obtaining any substantial return is to give Mr. Morris White the chance to come back. The 20 per cent., as I understand, the stock in trade, might, under a forced sale, realize something on the order of 20 per cent. of claims; but I think that is very doubtful, because it undoubtedly, with Morris White going out of business, would probably depress the price of this raw material. The creditors are therefore gambling a problematical 20 per cent. minus of cash against the ability of this man who built up this business from nothing to a gross of something over $5,000,000, as I understand it—$7,000,000 a year; and my client is in favor of the plan; and we have arrived at that conclusion after long discussion with Mr. Morris White individually, and I personally have talked to Mr. Wolinsky, his manager, and I am convinced it is to the best interests of the creditors to accept this offer.

[fol. 105] The Court: The thing that I have in mind is as to how the new corporation is to carry on so far as capital is concerned.

Dr. Sirovich: If it pleases the Court, as a physician I have uniformly found that it is not what a man eats but it is what he digests and assimilates that contributes towards his health and strength. Every economist will advise you, your Honor, that it — not what men earn, but what they save that contributes towards their wealth. Every educator will teach you that it is not what men learn, but what they remember that contributed towards their education; and every minister of the Gospel will say to you that it is not what men preach, but what they practice in this world that counts. And as the president of the Industrial National Bank, one of the largest creditors involved in this situation, your Honor, I have come here, irrespective of who may appear on both sides, to try to bring justice to the greatest number involved in this situation. If it pleases your Honor, there are 150 creditors who are obligated, through Morris White. These 150 creditors represent five banks and 145 creditors. To the five banks there are owed,

in approximate numbers, by Morris White, Inc. the sum of $280,000; in round numbers, we will say $300,000. To the creditors themselves, the 145 others in this case, Morris White, Inc., owes in round numbers about $450,000. Therefore, to the banks and to the creditors, 300,000 and 450,000 represents $750,000. To the Government of the United States in Federal Income Taxes there is due $80,000. To the State Department on income tax there is due about $60,000. For taxes to the City of New York about $50,000. So that if it pleases your Honor, in this entire case the [fol. 106] total indebtedness that Morris White owes as of May 21 is the sum of $950,000. Of the $950,000, your Honor, 300,000 to the banks and 450,000 of creditors, there are almost 300,000 therefore that are willing to see that Morris White be given that opportunity to go on. The Government of the United States in Washington is willing to come in just as every creditor, and not as a preferred creditor, to see that justice to Morris White is done. The same with the State. If you go and put this man into bankruptcy you are ruining every man here to whom Morris White is indebted.

The Court: Well, the Government takes priority, does it not?

A Voice: Only in bankruptcy, your Honor.

Mr. Baum: I don't want to interrupt. It retains the priority but it has agreed that it be tranferred.

Dr. Sirovich: Now, if it pleases your Honor, with all this money that is due, we have the picture of a man who started in this business twenty-five years ago when the leather and pocketbook business was controlled by the foreign capitals of the world, in Germany and France; and in twenty-five years he has built up this American industry that he represents, the largest concern, not only in America, but in the world, employing between three and four thousand people, and has built up a plant in twenty-five years, never taking away a dollar from a human being, making every year at least $600,000 profit; and here last year, in this great economic depression that has subjected and forced thousands of businesses into an economic state of depression, this man, through no fault of his own, finds himself in the position, where he has made $600,000 every [fol. 107] year, in this year, through this economic depression and through the fact that people cancel-ed orders by

the thousands—millions, and through the fact that he had made investments in the bank, suit for which the distinguished gentleman here on the opposition is defending, where a fortune was lost by him in an honest endeavor to maintain business—comes before this Court, not in the sense that this gentleman has said, that he is ruining people—he is one of the finest philanthropists that I know; thousands of his dollars have gone to every conceivable charity, without regard to race, creed or color. And if it please your Honor, if this man be given an opportunity to come back and put three or four thousand people back to work, not a cent will be lost to anyone; everyone will receive their money back. And what is this atrocious system, that so much vituperation has been hurled in the face of the Court. These gentlemen will see, if the Court approves of this reorganization, as I sincerely hope you will, your Honor, this reorganization has a Board of five directors, three composed of the White personnel, one representing the banks and one representing the merchandising creditors. Mr. White, nor any man in that business can receive not a dollar compensation in any shape, manner or form unless four out of the five agree. The plans and policies must be approved by those four out of the five. And when you take into consideration, your Honor, that every industry in which this pocketbook and leather industry is involved throughout the country are today engaged with strikes with the labor unions, and here is the only man who has maintained labor conditions and wage conditions, to make [fol. 108] the home and the hearth and fireside the better for his having lived; he has given of his today that others might be the happier tomorrow; and I contend, your Honor, that if you allow him to go back, as he will, he will reflect credit upon the judgment of the Court. And for the benefit of those gentlemen who are opposing, let me say something, that I have just received ten minutes ago. This is the picture, your Honor: Morris White, Inc. has approximately 150 creditors made up of banks, five, and 145 merchandise creditors. Their total liabilities to the banks are $281,000. The total liabilities to the merchandise creditors are $441,000. The accrued rentals and real estate taxes are $47,000; Federal taxes, $80,000; New York State Franchise Tax, $57,000; accrued expenses and pay-roll, $10,000; Receiver's certificates, with interest, $25,000. Making a total of $943,000——

Mr. Wise: Your Honor, may I interrupt just one second there? I think it was stated yesterday in this Court Room——

Dr. Sirovich: If it please your Honor, I would like to proceed without any interruption.

Now, on the other side of the picture, Morris White has, as current assets on May 21, cash in the banks of $107,000; accounts and notes receivable, free, $61,000; merchandise inventories in the approximate amount of $562,000, made up of raw materials, $387,000, and finished goods, $175,000. And there is no doubt that all of those accounts will be collected, because they are A-1 accounts. Other assets as of May 21 are, investments in and dividends of subsidiary and associated companies of $2,277,000; machinery and equipment, less depreciation reserve, unlisted securities to [fol. 109] the amount of $60,000. And he has made every year, from 1922 up to the present time, almost $600,000 to $800,000 profit. And, if your Honor please, if all those men who are men who mean well and whose intentions are honest, will unite with the 80 or 90 per cent of the creditors, including the banks, who are in favor of seeing this go through—they say that the majority are always wrong, irrespective of right or wrong; but here is a case where the majority are right, and the majority seeks justice, not only for Morris White, who has never been a failure in twenty-five years, but who has made this country the greatest and the largest country in the world in the manufacture of this commodity—the Government is willing to cooperate; why shouldn't we all cooperate with this man who has done so much good and say "Go on and make the world better for your having lived."

Mr. Wise: Your Honor, I call your attention to the fact that the Government has not surrendered their preference; they are maintaining their preference, but they will extend that time. The tax is listed at $80,000; and it was stated yesterday to be over $100,000 in tax due to them.

The Court: What is the amount of your claim?

Mr. Baum: The amount I should say would come about $90,000, roughly speaking, undisputed.

Mr. Wise: The second thing is that they say that Mr. Morris White has built up, during twenty-five years, a wonderful business, without a failure; and here they are before

this Court with an enormous failure. And the principal asset they list is $1,700,000, note, unsecured——

Mr. Palmer: Who do you think it is?

Mr. Wise: That is what I want to know.

[fol. 110] Mr. Palmer: Why didn't you ask the accountant or the lawyer, and they would tell you?

Mr. Wise: Vincent Astor says he is willing to go on with this thing. Of course he is; he is the landlord; he is going to get some rent. If this thing is sold under the hammer today, he loses his tenant. Of course he will play with them. But I submit, your Honor, particularly, that we do not admit that Morris White is a mystic man that can draw this thing out of the fire. His very actions in the past three years has proved it; he has brought this company down to absolute ruin. On that theory then, they set up a statement here which shows that every single figure on the assets side has had to be changed; and today they cannot show me any $4,000,000 of assets, nor one-half of it; and they come in here and list the raw material and manufactured stock at $1,400,000, which they admit today is not worth more than $400,000. As Mr. Tuttle said yesterday, this thing should have been in a Court of Bankruptcy and not in this Court.

Mr. Weisman: May it please your Honor, I think perhaps a complete statement of what the Credtiors' Committee hoped to do and tried to do and feel that they accomplished in the presentation of this offer will clarify the situation. I say to your Honor it is regrettable that gentlemen such as are sitting on the other side of the table, although afforded a full and free opportunity to ascertain all of the facts and circumstances and figures in this case, have neglected so to do, but come in at the last moment with a lot of blatant mis-statements, inaccuracies and mere jamming of wind, your Honor. I have been in this matter for three months; [fol. 111] I have labored with this Committee; we have spent days on days—and I mean that literally—and I will take every statement that has been made here, your Honor, and show that one after the other, it is either untrue or inaccurate or has taken no regard for the facts, circumstances or the very offer that was made here and was before them. At least, if they did not want to spend the time to go to the office of the Receiver or to Mr. Stern, or to the office of Mr. Glass, the attorney for the Receiver, before coming in and making

such statements as these, they could have had the decency or integrity to read what is in the offer. Every statement that has been made here about lack of control, lack of protection, is negatived by a reading of the offer, which I will analyze for the benefit of these gentlemen, and which I want to place before the Court.

Now, in the first place, your Honor, this Committee has been attacked. It has been said: What is this Committee? Who is this Committee? The imputation was made that the Committee was formed before the Equity receivership. Now, I say to your Honor advisedly—and I sincerely trust that the stenographer is taking what I am saying; I want the record of this case to show the facts—I say to your Honor that this Committee was chosen from the floor of the creditors' meeting, at this creditor's meeting, after a poll, it was ascertained that there was present $747,000 worth of liabilities, and this meeting was called after the receivership by the Receiver himself. Now, so much for the Committee. Now this Committee, which has labored—and I will take your Honor's time to tell you how conscientiously and patiently this Committee labored; this is an important case to [fol. 112] this Committee, your Honor, and they beg of your Honor that you hear the facts. This Committee, by its personnel, represented $178,000 of merchandise claims. That is, your Honor, that this Committee was the executive of people to whom there was owed by Morris White, exclusive of the banks, $170,000. In addition to this, the banks had two men out of a committee of nine; and to the banks was owed, unsecured, $262,500. That is exclusive of the secured money, which amounts to $179,000; which security, by the way, was given as cash was given; there was no question of preference as to this security; this money was concurrently advanced as cash, and as the cash was advanced, the security was taken. Let that be plain.

Now, as to the facts in this case. Mr. Tuttle, with lack of preparation and under the strain of a great criminal case, comes into this Court, your Honor, and closes his eyes to every single fact and circumstance: "We haven't had time. We don't know. We have been kept in the dark." And he says "I represent the National Surety Company." Now, let me say this to your Honor, so that the Court may be advised with what good faith this Committee acted. After the appointment of this Committee, when it was ascertained that

a representative of the National Surety Company was in the room, although he requested not to be put on the Committee, the Committee requested him to come on, ex officio. And he sat in on every deliberation of that Committee, the National Surety Company's representative, Mr. Moak. Every fact, every figure, every thought, every deliberation was openly and fully presented to him. So now your Honor has a pic-[fol. 113] ture of this Committee. There was no secret about it. Every piece of information was open. When Mr. Greenebaum came on here from Chicago and walked into my office, he said, "Mr. Weisman, I am a creditor." I said to Mr. Vise, their attorney, "Every piece of information that I have in this office is at your disposal. Every question you want to ask me, I will answer." And I sat down with Mr. Vise for three hours—is that correct?—I went over every single fact and circumstances. He said, "If I had known that I would not have come in. We don't want bankruptcy in this case; we want a constructive job done."

(A question was asked, which was inaudible to the reporter.)

Mr. Weisman: I will answer that: Certainly not I. We have had enough of these innuendoes. The statement has been made here by Mr. Tuttle, indirectly, but bearing the same weight as if it were directly made: "What side agreements have been made in this case?" Now, by asking a question, the force of the inquiry is none the less there, just as if the direct accusation is made. If Mr. Tuttle had read it over he would have seen that this Committee labored to prevent the possibility of such a thing. And I will show your Honor that such a thing is factually and legally impossible under the plan that is set up here. So that this Committee met; there was nothing secret, nothing that was not open. I might say parenthetically, that while I was counsel to the Creditors' Committee, openly selected by them, at my request and at my invitation—and if any of the gentlemen are here, on the Creditors' Committee, they will bear me out—I begged of them, since the thought was to [fol. 114] present as water-tight and constructive a plan as possible, that they bring with them, to sit in with us, their own lawyers; and I will say to your Honor, they did. The largest creditor in this case, merchandise creditor, was R. Neumann & Company, and Mr. Charles Riegelman, his law-

yer, came in and sat with us, prepared the agreement, drafted it, examined it and did all that he could to help. One of the next largest creditors was Mr. Quigan. Mr. Quigan brought his attorney; Mr. Morris Survis, a member of the Committee, is also a lawyer.

Now, this Committee got together. There can be no doubt in this case, your Honor, that Morris White, Inc.—my friend has spoken of this tremendous failure that Morris White has made. I will tell your Honor what this Committee knows and I will tell you what is the fact with this Committee, and what is the fact with this business: That this business, less than a year ago, owed over $3,000,000 to creditors. That when the depression came, in this case, this business had $2,000,000 of orders, of which $1,500,000 worth were canceled When a store like Marshall Field, Carson, Pirie, Scott and such people give firm orders and subsequently cancel them, shall the black baby be laid at the door of Morris White, when he receives cancellations to the extent of $1,500,000, notwithstanding that? Now, that is the fact, and I regret that it must be brought out here. Morris White paid down his creditors from over three and one-half million dollars, to a sum of about $750,000. Morris White had stripped his home, taken the tapestries and pictures off the walls and poured the money into this business and paid his creditors. Mr. Palmer is helping me and calls my attention to the fact [fol. 115] that he also pawned his life insurance, which he carried to the extent of over a million dollars, and poured it into this business, to save the creditors. These things are indicative. There must be some reason why these creditors want to save this situation. Mr. Morris White, on the day of the receivership, walked out of Morris White, Inc., and they had money in the bank, without a five-dollar bill in his pocket; he didn't have his last week's salary, and he could have taken it. Now, with regard to the proposed examination in this case, your Honor; I say to your Honor there is no necessity for any. A matter of three months before this receivership went into effect, the Morris White, Inc. was operating virtually under a friendly receivership——

Mr. Palmer: Five months.

Mr. Weisman: Five months the creditors knew of this situation. This Equity receivership was forced by the recalcitrance of one creditor, who refused to play along when the rest of the creditors played along; and during

those five months, the creditors were reduced by almost $750,000; but one creditor refused to play along. During that entire time——

The Court: Is he opposing here today?

Mr. Weisman: No. During that entire time, your Honor——

The Court: What brought him around?

Mr. Weisman: He got a judgment and has a preference. We cannot alter the fact; it is regrettable.

Mr. Palmer: That has been before your Honor. That is the Lesser Brothers' claim.

Mr. Weisman: Yes: that is the Lesser Brothers' claim. [fol. 116] If it was not for that, this thing would have worked out; that was about $13,000. During those five months, your Honor, the creditors talked to Morris White and said "Morris White, not because we do not trust you, but because we have a duty and a trust to the other creditors in this case, we want a firm of accountants, chosen by ourselves, to run your books." And there, at the dictation of the creditors, one of the well known firms of this town, Klein, Hinds & Finke, were chosen. During those five months no check was drawn that was not O. K'ed by the accountants. Nothing was done that did not bear the light of inspection. Morris White voluntarily reduced his salary. So we came into this Equity receivership. It was the desire of the Committee to save this business, with no ulterior purpose; with the purpose of saving the business so that future profits might be made——

The Court: Tell me this: Do you really expect that this business will be such that before the liquidation of these notes which are to be given, earnings may accrue which will permit the payment of dividends on this preferred stock?

Mr. Weisman: I will say advisedly to your Honor, that it is the sincere belief of the Creditors' Committee, that those notes will be anticipated by at least a year, and that by December, at least one-half of them can be paid off and that the stock will be wholly redeemed. I will come to that.

I want to say further to your Honor that the banks in this case have said to me that "If, as and when this plan goes through, that if Morris White should require financing, we are ready to do it." I want to say further——

[fol. 117] The Court: On what basis?

Mr. Weisman: On the basis of an open loan. They think the company is good.

The Court: Any form of security? Or just based on——

Mr. Weisman: No; on the basis of an open credit. That this company, based on the statement that they will have, if this plan goes through, is entitled to credit. I will say further to your Honor that the Commercial Investment Trust—that is the C. I. T. referred to, in this case—and I have taken it up with them knowing the history of Morris White, knowing the business that he has done—to enter into a factoring arrangement with him, because they are absolutely assured that this business will make a colossal fortune, as it has always done in the past. So that this business, if this plan goes through, must go marching on; it is only a question of how much profit it will make.

Now, let us look at the business side of this, your Honor—and then I want to presume upon your Honor to allow me to show the legal side of this, which my friends have so patently closed their eyes to, that the creditors in this case are absolutely and entirely protected. After all, I am somewhat responsible for this agreement; the aspersions cast upon it hurt me, and they are not the fact. The Creditors' Committee, composed of men who spent time on it—they don't come around and make a speech, and in disregard of the facts. Their money was in this thing. They have done, during the past, millions of dollars of business with Morris White, and they hope to do millions of dollars of business with him in the future. But no creditor is going to give away anything. He wanted to put Morris White in [fol. 118] a position to carry on business, directed by him, under such a plan that did not deprive him, the creditor, of any present value that he had. And the creditors went over this situation; and I have put before your Honor a statement. You will notice, your Honor, that alongside of the figures given by the accountant, are figures in ink. Those are not my figures. Those are the figures that the Chairman of the Committee wrote down as the realizable value of those assets, after a full and complete analysis of the assets by the Creditors' Committee. Now, let me tell your Honor how this Creditors' Committee operates. They had nine members of the Creditors' Committee. The Creditors' Committee wanted to be fair, they wanted to be just to themselves, and they wanted to be known as just to the world; so they said "We will divide ourselves into two sub-Committees. There is not going to be any question in this

case as to these assets or how much they are worth." So thereupon the Committee divided itself into two sub-Committees, to outline what would happen. And the two sub-Committees, neither of which knew the result of the other's deliberations, came to a conclusion within $17,000 of one another. There were two Committees appointed to see what would happen in the liquidation in this thing. The Committee divided itself into two; and the two sub-Committees, neither one was to know the deliberations of the other. And when they were opened, they came within $17,000 of one another, of the assets.

Now we say this to your Honor: This matter required constructive work. It is very easy to come into this room and say "We don't like that, and this is not any good." [fol. 119] and to attempt to belittle what has been done, without offering any constructive suggestion. It is too bad that they will close their eyes to the facts and figures, when they are available. It is the fact that every creditor on the Creditors' Committee came to this conclusion, your Honor; and it is the conclusion of these eight business men on that Committee, and myself, a lawyer—certainly the eight are not all wrong; certainly the eight could not unanimously come to a decision which would have no merit or weight. They came to that conclusion, and correctly so. They came to the conclusion that in these depressed times, in this market, where, if these goods are thrown onto the market, there is not the market with which to absorb them, that this merchandise will bring insufficient even to pay the priorities.

The Court: Can you tell me what your hope is, so far as doing business immediately is concerned?

Mr. Weisman: Yes, your Honor, I can; we have gone into that. I want to say to your Honor that while these assets, if liquidated now, will not bring enough to pay the priorities, it is absolutely the belief of the Creditors' Committee and of Mr. Morris White, that if this business is rehabilitated, those assets are worth at least $700,000.

I regret that I am so lengthy, your Honor, but I want to give your Honor all the facts in addition to those, so that your Honor can judge the constructive piece of work. Here this Committee feels that we have more than a fair opportunity of salvaging much more than 100 cents on the dollar, and I will tell your Honor why. It is illuminating. These gentlemen could have found it out.

[fol. 120] Among the assets listed there is a note, which my friend has referred to, $1,700,000. The Morris White Holding Company owes to Morris White, Inc. There is not any secret about it, and there is not any mystery about it. Mr. Morris White—the White Holding Company, rather, owns real estate today, which, appraised by the foremost real estate experts in this town as recently as four weeks ago, shows an equity of $3,000,000. However, that real estate company was threatened with foreclosure of a blanket second mortgage. Thereupon the company went into bankruptcy. Whereupon the second mortgagee got together with a representative of the concern in Equity receivership, or in bankruptcy, and the following tentative plan has been worked out, whereby possibly a million dollars will be saved to these creditors; and it is this: "Gentlemen, if Mr. Morris White can save this business and go on, we will consent, or we will work out an arrangement with you whereby this real estate will be saved, instead of foreclosing our mortgage now; and arrangements will be worked out to carry us over this real estate depression, so that you can realize on your equity in this company." Which means that there will be thrown back to this Morris White, Inc. a value of a million dollars, or $1,700,000; while, if this thing goes smash into the pot today, the entire equity in that real estate must be destroyed, and everything goes up into smoke. And I want to say to your Honor, this real estate is the finest in the City of New York, but there is not a present market for it; such property as the Fifth Avenue Hotel, the Hotel White, the Whitehall Hotel, and such property, which always have made money, but at the present time they [fol. 121] are not; but they are carrying now, and if we can go on, those equities can be saved.

Now, the Committee took all of those facts into consideration; they took into consideration the fact that at the present time, if these assets are thrown on the market, if a constructive piece of work is not done, that the entire industry will be demoralized, that the prices which will be brought will not satisfy the priorities, that they haven't got a chance to get out; while, if Morris White continues, these assets are worth, as a going business, $750,000; his past history has been good; his honesty is unassailable;

he has made money; so they said to the lawyers in this case, "Now, gentlemen, you work out a proper plan whereby if we turn this business over, the creditors will be protected."

Now, there has been a lot of statements made here that the creditors have not got any protection. We have never heard of such a thing. This thing is all thrown over to the creditors—or to Morris White, as my friend Mr. Vise has said and suggested to your Honor that an injunction issue, that Morris White cannot work anywhere else. I want to say to your Honor that this is—we have met that in this very agreement; and that is indicative of the fact to what extent this Committee lived with this thing to adequately protect the creditors; because when your Honor reads the agreement, as I will analyze it to your Honor, this agreement provides as follows: The minute that Morris White steps out of that business, the creditors get control. Does that meet your injunction? Well, it should. The creditors said "We want Morris White in this business."

[fol. 122] The Court: Yes; but if he is the man that you say he is, and he does step out and goes into an opposition concern, the corporation would not be able to compete with him.

Mr. Weisman: That is what we wanted to be sure of. But I say to your Honor that Morris White is in Court, and I am sure will tell you that he will consent to the jurisdiction of the Court, if your Honor should issue such an injunction.

Mr. Stern: Why not consult his lawyer first?

Mr. Weisman: Well, I beg your pardon; but I know Morris White.

Now, your Honor, Mr. Tuttle not having had the time to read——

The Court: Tell me this; I want to ask you now: Carson, Pirie, Scott and Marshall Field and other large distributors of the product of this business have cancelled their orders, you say. What prospect is there that they will place new orders in the immediate future?

Mr. Weisman: Now, to use the vernacular, they are all rearin' to go the minute Morris White steps into the business. He has told me, and I have analyzed with him, that in the coming season he can make $200,000. He is here, and I will let him tell your Honor how his plans are—how

he is working, as soon as I get finished with the legal aspect, which I think should be cleared up in your Honor's mind; I don't want to have your Honor have any idea in this case that this Committee did something furtive or secret; that this Committee did not endeavor in every possible way to protect the interests of the creditors in this matter.

In attacking the offer Mr. Tuttle evidently did not have time to read it, and he hit upon a sentence and he said "This is a terrible thing." Well, that is not fair——

[fol. 123] The Court: Well, let us get along down to it.

Mr. Weisman: Well, now, here, your Honor, this proposed certificate of incorporation provides, as every certificate of incorporation ordinarily does, that the preferred stock have certain rights and the common stock have certain rights; and it provides in the words of the statute; and Mr. Tuttle reads and he sees: "the holders of the common capital stock shall have the sole and exclusive right to vote and consent for any purpose"; but he failed to read this to your Honor: "Except as otherwise provided by statute, and except as is expressly provided herein." Now, here is what is expressly provided herein. It says: That the preferred stockholders shall have no right to vote for directors except for the two directors that they want to elect. That gives them the right; so certainly they have the right; they have the right as long as Morris White is connected with this business, to elect two directors. As soon as he is not connected, they take over the control and they have the right to elect three directors. There are certain things that the Creditors' Committee did not want to have anyhing to do with. They did know, from past experience, there were certain things they did want to have and that they wanted to vote for. For instance, for the guaranteeing of bonds of any other company. In other words, we knew what was the trouble with this business; we knew that Morris White, like every good merchant, loaned money outside, and we wanted to know that we were going to stick to this business and that we could go on keeping the assets for this business; so we recommended that in the certificate of incorporation, the preferred stock-

[fol. 124] holders will have the right to vote upon any proposition for the guaranteeing of bonds or obligations of

any other corporation; then they shall be entitled to vote solely and only as a class and to the exclusion of any other class of stock upon any proposition for the establishing of priorities or creating further preferences among the several classes of stock. In other words, until this stock is paid out; until these creditors have realized 100 cents on the dollar, our preferred stock, as among other corporate issues, has a class lien on all of the assets of this company. We do not care about whether or not the name of this company is changed; so we said we did not want any vote upon the change of name; but if this company was going to be consolidated with any other company, the preferred stockholders were interested, so we said: "The holders of the preferred stock shall be entitled to vote upon any proposition for consolidation pursuant to Section 86 of the said law." Then we said to ourselves: Well, we don't want any more stock; and this agreement provides that the preferred stock of this company can only be issued to the creditors of the old company, so that there can be no water so far as this stock is concerned; and we put in this provision: "They shall, however" (referring to the preferred stockholders) "be entitled to vote upon any proposition for increasing or decreasing the number of shares of preferred stock"; then we went further; we said: "Maybe the majority will agree; we will make it stiffer and harder. We want every single creditor to know that his preferred stockholdings are all right"; and we said—"the statute says 'majority,'" but we went on and we said "the consent of the holders of two-thirds of the issued outstanding preferred [fol. 125] stock shall be necessary and requisite to increase the number of shares of preferred stock." Then we went on as follows: "The holders of the aforesaid preferred stock shall at all times while it is outstanding, have the sole and exclusive right, as a class, to elect two of the five directors of the New Corporation. Said right to elect shall remain at all times until the stock is redeemed." Now, then it went on: "in the event that Morris White shall fail to act as general manager and president of this company, then the preferred stock shall have the sole and absolute right as a class, to elect three directors of the corporation

and from and after such date the common stock shall have the right only to elect two directors."

At this point, your Honor, I want to show the indicative thought in the minds of the creditors as a body—never mind the few objectors; in no proposition can we get 100 per cent—that was in the minds of the creditors: We are safe and secure in this thing as long as Morris White, his ability and reputation are in it, but the minute he steps out, we want a new deal; we want then to have control. And there is in here this piece of probative evidence, which I believe should carry great weight with the Court. Then Mr. Tuttle said, "Why, the Board of Directors has the right to employ the executives of this company and fix their salaries and the common stock has three and the preferred stock has two. What protection have we?" Well, we were not blind to that. If he had read the agreement he would have seen that the agreement says this: "the Board of Directors shall have the sole and exclusive right to employ the executives of said corporation and to fix the amount of [fol. 126] salary as to all such executives and such action of said Board of Directors shall be concurred in by four of the five members of the Board in order to be a valid exercise of the powers of the Board of Directors in that regard,"; and he would have borne in mind that two of those directors must be elected, one by the preferred creditors and one by the bank creditors. And then we went further to protect the creditors in this case. It came to our minds: Suppose a director dies, and then, unless other provision is made therefor, the remaining majority directors could elect his successor for the balance of his term. We said: No, we don't want that. If any one of the Board of Directors die, we do not want the balance of the Board to elect his successor; or if he resigns; we want the stock- to elect him; and this certificate of incorporation provides that in the event of the resignation or disability of any director, the stockholders of that class who elected the director whose resignation, disability or disqualification cause such vacancy, shall elect his successor. And then we went on and put in this provision: that no dividends—now they have spoken of this common stock and they say: "What protection have we got?" Now, all Morris White has got in this case so far—and I am analyzing it sheet for sheet,

and word for word—is the right to work for his creditors. I will say openly that the creditors in this case were willing to take less. He said "No, gentlemen, I am going to pay you 100 cents." And all he has got is the right to vote that common stock—the common stock is worthless until the preferred stock is wholly paid, because this certificate of incorporation provides as follows: "No dividends however [fol. 127] shall be paid upon the common stock until all outstanding preferred stock shall have been redeemed or retired." In other words, until this preferred stock is fully redeemed or retired, the only thing that Morris White can get out of this business is such salary as the creditors will agree to give him.

Now, this agreement has been attacked as loose, no protection, nothing done for these creditors.

Then the other question came up: Suppose these profits are allowed to pile up and the creditors do not get anything. We want a vehicle for the distribution of profits. We want to see that profits will come to us. So this agreement was written in: "It shall be mandatory upon the directors"—(now mind, we have two of our own, but we were worried about the other three—they were not worried, but we, as lawyers wanted it)—"It shall be mandatory upon the directors of the New Corporation to cause an audit of the affairs and the business of the corporation to be made each year by a firm of Certified Public Accountants of its selection. In the event that any such firm of Certified Public Accountants shall report that during any fiscal year ending after July 1st, 1933, there has been any net operating profits earned by the said corporation" (the 1933 are after the payment of the notes, which are a fixed obligation) "that then and in that event, subject to the provisions of law applicable thereto," (that has always to be tied up with the law applicable) "it shall be mandatory upon the directors of the said corporation to cause the corporation to apply one-third of the said earned net operating profits of the corporation for said fiscal year to the redemption and/or retirement of the aforesaid preferred stock."

Then we said this—I hope I am not tiring your Honor, but I want your Honor to get this picture—then we said [fol. 128] this: Maybe these directors will say: "This is

not profit; and this is not profit." So the next clause goes on to say and fix what are profits.

Then we came to this question: This preferred stock was going to be handed out to the creditors. There has been a lot of talk about—today for the first time, because up to this time everything has been lovely, your Honor, everybody has been doing a constructive job—side agreements; something is going to be done in this case; whose stock is going to be redeemed first. We have this clause in the agreement: "Whenever redemption or retirement of preferred stock is referred to herein, it means pro rata redemption and/or retirement, as the case may be." So that nobody can get anything that the other fellow cannot get.

And then we come to this question: There were these notes outstanding and the thought came up: Well, whose notes are going to be paid first? True, the notes have got a fixed maturity; but what is to protect the creditors? Shall we take Bill Jones' notes and pay them out of our present profits and not pay John Smith? So we put the agreement in here that the corporation shall file a covenant and consent with this Court for the benefit of all of its creditors, that in the event that any one of the notes are redeemed before another note, that then at the option of the holder of the other note, his note becomes immediately due. In other words, we believe—the creditors believe we will be able to anticipate payment of the notes. The creditors believe that before December, half of them can be taken up; but if they are taken up, no creditor can be preferred over another creditor, because the agreement [fol. 129] specifically says that before this new corporation gets these assets, the new corporation must file in this Court a covenant and guarantee satisfactory to the Creditors' Committee to the effect that if any note is paid before any other note, if there is anything to prohibit the payment of those notes or anticipate them, then, in that event, all outstanding notes should immediately become due and payable. Then, of course, under liquidation, the preferred stock must be paid in full before the common stock gets anything.

Well, then we had this situation, your Honor. They said: This stock is going to be broadcast; going to go among various creditors. It may be said that Morris White

could get concerted action; he has an interest in the thing; he may, by getting control of a substantial portion of this preferred stock, defeat the rights of the creditors herein, because he will have unanimity of action while we won't. So we even were careful enough to set up the machinery to prevent that; and when your Honor reads the agreement, you will see that the stock itself does not go to the creditors at large, because in that way there might be some difficulty about electing those two directors; creditors may be influenced by others; creditors might not care about getting stock; the stock might be bought up. So this agreement provides that the creditors will not get the stock but that the stock will be issued to two voting trustees; that those two voting trustees, one shall be nominated by the banks and one by the merchandise creditors; that these voting trustees shall issue their voting trust certificates to the owners of the stock; that these voting trustees will for a period of ten years, unless the stock is sooner redeemed, [fol. 130] vote to elect at all times the two or three directors that may be required.

Now, I say to your Honor advisedly, that in addition to that, when this notice was sent out approximately a little over two weeks ago, the names of the committee were set forth in the notice. That was done advisedly. We thought that if any of these gentlemen had any objections, they could have gotten in touch with us. The facts have been open and at all times available.

In conclusion, I say to your Honor that the Creditors' Committee in this case, with a due regard to the existing situation, in an effort to do a constructive piece of work, as distinguished from a hodge-podge job without any regard to the facts, went over this situation and carefully analyzed every fact, figure and circumstance, and then said: We do not want to get any less than we are presently entitled to but we want to, if possible, save this situation; we want to capitalize the going worth of this business; we don't want this industry demoralized with the throwing on the market of this merchandise, which will realize nothing for us. And I want to say to your Honor—and then we wanted the acme of protection, and the protection that has been worked out for them, and criticised here, as I have shown to your Honor is not subject to that criticism; and I want to say in conclusion to your Honor that I have

not spoken to a single individual or Government agency but that when they had all the facts, figures and circumstances, did not agree that this was the best and only constructive thing that could have been done in the circumstances; and on behalf of the Creditors' Committee I respectfully urge upon the Court, in view of the facts before us, disregarding these misstatements and inaccuracies, the [fol. 131] Committee respectfully urges, in good faith, that this offer may be approved and recommended to the Receiver for its acceptance. Thank you.

Mr. Stern: May I be heard, if your Honor pleases—these gentlemen are doubling on themselves——

Mr. O'Connell: No, I am not doubling; I just want to ask three or four questions which I think are vital. Nobody is here to destroy, but we are here, as far as I personally am concerned, to see that we are amply protected.

Mr. Stern: All right; I will be glad to answer any questions.

Mr. O'Connell: Why should not the creditors be in control until they are paid? Why shouldn't they have three of the five directors?

Mr. Weisman: I will tell you why, if the Court will bear with me. These creditors—that very thing came up and was fully discussed—and these creditors said to me, and it is the concensus of their opinion, that: We have confidence in Morris White; we are "in the know," so to speak; nothing can be done here that we don't know; we don't want to run this business; we think Morris White is better qualified to run this handbag business than we are, and we want to be in a position to know what he is going to do; we want to be in a position to block anything that is wrong, but we don't want to assume the responsibility for managing this business. This business is a man sized job; we have got our own business; he has always made a success of his business. And I say to these gentlemen, this business has not been ruined by the handbag business. It is unfortunate that Morris White, with a twenty million dollar business, lost [fol. 132] the twenty million dollars in outside ventures and today is not worth anything; but this mare was a good horse; this horse can pull this situation out——

The Court: You are arguing again. Just answer the question; that is all.

Mr. Weisman: That is the reason.

Mr. O'Connell: He can still manage the business and they can stay there in control. Now, if they are in the minority, he is in control, obviously, and he can do things which they might object to, but they would have no legal power, being a minority of the Board of Directors, to stop it, within certain limits. I am just voicing my objection, for the benefit of the Court and yourself.

Now again, why should not the creditors be paid interest on their notes and cumulative dividends on their preferred stock. If this thing can be worked out so that they can be paid, they should be paid in full.

Mr. Weisman: May I answer you on that?

Mr. O'Connell: Yes.

Mr. Weisman: I will tell you the discussion of the Committee. The question of interest came up and they believed, and this entire plan is predicated upon the thought that they are going to ultimately and much more speedily than the plan set up, because that was the first requirement, to get 100 cents on the dollar; and they say, in this particular case, because we are bringing Morris White back in business, we are going to get 100 cents, where we cannot get anything today; so we don't want interest. Let me say further to you, I represent some banks in this case—that is how I became interested—and we are very keenly interested in interest, but we don't want to lose sight of the principal. They [fol. 133] thought if they could get the principal in this case, 100 per cent, they are perfectly satisfied to do that, but they should not burden the business.

Mr. O'Connell: All right; within a reasonable period of time, that is true; but there should be some protection that if payment is not made within a certain time, that these dividends shall become cumulative. Let me point out to you—I may be in error; I read it there several times, but I am not as familiar with it as you are—under the terms of this offer, as I see there, it is entirely possible, after a period of years, without any limitation as to the period of time, to redeem the preferred stock and never pay a dividend on the preferred stock. It seems to me the statement in there that it is 6 per cent preferred stock does not mean a thing. Isn't it possible, by devoting earnings to the preferred stock from time to time, to take your time, as the earnings guide you,

and pay off the preferred stock dividends? Is that possible?

Mr. Weisman: No, it is not.

Mr. O'Connell: Why?

Mr. Weisman: I will tell you why. I am responsible for that structure. This agreement I read to you before provides that one-third of the profits each year, after the redemption of the notes, must be applied in redemption of the preferred stock.

Mr. O'Connell: Not dividends; but redemption.

Mr. Weisman: Wait a minute. It further provides that before a penny can be paid out for the common stock, the preferred stock must be wholly redeemed; so that the creditors in this case—the Creditors' Committee—after all, we [fol. 134] could not suit 150 separate creditors; we tried to work out the best and what the concensus of opinion desired. The creditors then said that since under this plan, before anybody else gets a penny, we must get 100 cents on the dollar, and since that 100 cents is not here now and since it will only be developed by reason of this going worth of this business and the work which will be done in it, we are perfectly willing and we do not want to burden this business with cumulative dividends and it does not make any difference to us anyhow, because, cumulative or non-cumulative dividends mean nothing until it is declared. Now, that is the answer to that.

Mr. O'Connell: Well, let us assume that yearly earnings quite low, $150,000. One-third of that, $50,000, must be devoted to retire the preferred stock.

Mr. Weisman: That is the minimum that must be retired.

Mr. O'Connell: Yes; the minimum which must be retired is $50,000. Let us assume there are $750,000 worth of preferred stock. It is going to take fifteen years, at that rate, to retire that preferred stock.

Mr. Weisman: Not necessarily.

Mr. O'Connell: All we can hope for is a strict living up to your legal obligation. You may say: We are going to retire as fast as we can. We need our protection in that agreement.

The Court: I agree with this counsel that if this preferred stock remains open for a period beyond these notes, it ought to pay dividends.

Mr. Stern: Judge, the answer to that is, let us consider this from a business viewpoint. Now, I have remained silent; I have heard criticism, I have heard counsel for the [fol. 135] Creditors' Committee, and now I want to talk on behalf of the client.

We have here four commitments. We have got to pay 5 per cent every six months, each six months, and then we have got to retire this stock. Now, there could be no benefit to Morris White in this proposition at all until he got rid of the preferred stock. He cannot get a dollar's worth of dividend on his common, assuming that he earns it——

The Court: No but he could build up a surplus there, which would be most highly advantageous to him and put his common stock there as against the possibility. Now you have got the capital of the creditors there for years at his disposal, and at the same time he is building up a reservoir of value to his common stock.

Mr. Stern: Well, that is true; but the creditors get the benefit of it, because one-third of that reservoir that your Honor speaks of, must be accumulated and disbursed.

The Court: For retirement.

Mr. Stern: For retirement.

The Court: A man who is unfortunate enough that he must get out, and whose stock——

Mr. Stern: No, Judge, please; there is no retirement by loan; there must be a pro rata reduction. In other words, this plan provides—which has not been called to your Honor's attention—that if there is $50,000 for distribution, it must go pro rata among all the claims; and it provides the same way as to the notes: If there is any anticipation of any of those notes, it must go pro rata to all the noteholders. That has been absolutely taken care of.

Now, what the creditors did here, if the Court please, as a result of that trading back and forth—and mind you, sir, [fol. 136] I did not have Mr. Weisman to deal with, who is counsel for the Creditor's Committee, but I had three other lawyers to deal with, and it was a business proposition, and the creditors said: If we get out of this thing—and they calculate they will get out of this thing inside of three years, by all hazard—if we get out of it, that we can well afford, in view of the sacrifice that Morris White had made under the terms, to pay 100 cents on the dollar, to give him the inter-

est. And that, sir, frankly I say to you, is the result of compromise.

Now let me tell you why they are bound to get out in three years—these are actualities, sir. When I talk about the value of the inventory, we have got to guess; but here is the history from the books, as made up by certified public accountants.

In 1925 this business did a volume of $6,000,000; or, to be exact, $5,807,000, and made a profit of $400,000.

In 1926 it made sales of over $7,000,000, and made a profit of over $700,000.

In 1927 it did a business of $7,600,000, and made a profit of $556,000.

In 1928 it did a business of $8,546,000, and made a net profit of $716,000.

In 1929 it did a business of $6,890,000, and made a profit of $600,000.

So that your Honor will see that over a period of six years it has netted 10 per cent of its sales.

Now look at this set-up for a moment—

The Court: Not quite; a little under that.

Mr. Stern: Well, if you please, sir, make it eight.

Now, take this set-up a minute and follow it. In this in- [fol. 137] stance we have bank claims of $262,500; we have merchandise creditors of $442,500. My friend——

The Court: Now, tell me this, just while we are on that question of the volume of business——

Mr. Stern: Yes, sir?

The Court: What volume of business does he anticipate he can do—that is, Mr. White, anticipate he can do?

Mr. Stern: Mr. White can do anywhere——

The Court: I am speaking, under present conditions.

Mr. Stern: He can do approximately $3,000,000 worth of business, conservatively estimated, which will produce a profit, on the same basis, if you please—let us be conservative in our estimate—of a quarter of a million dollars. That is 7½ per cent; less than has ever been produced.

The Court: Can he make that percentage upon the prices at which he will have to sell his product now?

Mr. Stern: Yes; because the situation, sir, in the trade now, if he can get into business, is of great advantage to himself and to the trade, in that the trade is entirely de-

moralized; it is tied up with strikes, and Morris White, after having operated on a successful basis from a back room to an institution covering the world, over a period of twenty-five years, has never, until we got into this world-wide depression and his over-expansion in outside interests, produced anything but profit over twenty-five years.

The Court: May he not have these labor troubles that are now affecting other manufacturers?

Mr. Stern: Whether he will have them or not, we cannot tell; but we know that he is able to start into business tomorrow, if this Court——

[fol. 138] The Court: Is it a Union shop?

Mr. Stern: Yes, sir.

Mr. Weisman: He is assured that he will not have these labor troubles. I have asked him that—is that correct, Mr. White?

Mr. White: Yes. We have an independent contract with the Union, your Honor.

The Court: How much business do you think you can do in the next year, Mr. White?

Mr. White: Five million, in 1932, showing a net profit of close to 10 per cent.

The Court: I know; but take the six months; how much do you think you can do?

Mr. White: In six months, we can do $750,000, which would show a profit between 175 and 210.

The Court: Those are under present depressed conditions?

Mr. White: Under present price conditions—there are forty million women in America using bags every hour in the day, and we can sell them, your Honor, and we know how to make them.

Mr. Stern: Now, if your Honor please, here is what is going to happen: There are $700,000 worth of claims here, for 80 per cent of which, stock is going to be issued. Now, we have been talking here for hours about this proposition. There are 245 creditors in this picture, and not 145; and of those 245, which make up the total of the unsecured creditors of $862,000, including the preferred claims, you have only heard from one creditor, who has gone through a very vicious piece of litigation——

The Court: Just at this point, let me speak in connection with what you said.

Mr. Stern: Yes.

[fol. 139] The Court: I want to ask if there is anyone here who is opposed to this plan, others than those who have already spoken?

Mr. Loewenstein: I do.

Mr. Stern: Well, that is Mr. Loewenstein. His lawyer has spoken for him.

Now, if your Honor please, as far as the Loewenstein claim is concerned—and I have lived through this proposition—an action was brought shortly before this receivership and Mr. Loewenstein, for personal reasons which I won't discuss, was opposed to anything except payment in full.

The other creditor whom you have heard from is Levor & Company, who have gone through a bitter piece of litigation and recovered a judgment of about $4,500. Now, those are the only two direct creditors, sir, that have voiced any opposition to this plan, out of $862,000; and the Levor claim is less than $5,000, and the Loewenstein claim is 5600. So that you have got $10,000 worth of opposition in this whole picture. That is all you have got, aside from the clients that Mr. Tuttle represents, and as to those clients, sir, let me point out to you that on the claims that he speaks for, the surety companies, some of those men are on this Committee and some of those men are not covered in full under their policies. In other words, as written, they take the initial risk of five or $10,000; and the very surety company that he represents, that comes in here, finds itself in the position where the merchandise man, whose claim he holds, or the manufacturer whose claim he holds, is on this Committee, has made a 100 per cent investigation and subscribes to the plan.

The Court: Well, of course he has very little to lose if the surety company is behind him.

[fol. 140] Mr. Stern: No, of course I mean as to the risk, Judge, that he takes on the initial part. Now, many of these policies—and I am not familiar with the particular policies that Mr. Tuttle represents and he did not choose to tell us the terms of them, and so I rather suspect, as he suspected me, that there is something behind it—they take the risk of the first five or $10,000. A man with a claim here of 32 or $42,000 takes the first ten, and the surety company makes good over that; the reason for that being ob-

vious: that he must take the risk. Now, these very men, the Rex Novelty Company, the Artistic Company, are on this Committee. The executives of those companies, who have gone through this proposition have subscribed to this plan, and then backed out. And there is a reason for that, and if your Honor has had any experience with insurance companies, he knows the companies' position is: Face the loss and take your salvage now. The surety company here is the same as a fire insurance company; they don't want to listen to any settlement. They have incurred a loss; they know it is fixed; they want to know what they are going to get in dollars and cents today, as salvage; not what is coming out of the future. That is the reason for the outrush of opposition here now, in the hope that they will frustrate the plan, and in the hope that, in order to get rid of it, they ask, as Mr. Tuttle naively put it "What is on the side?" That is the reason for the opposition. Now, sir, I say to you that in this picture, where you have got a total of $862,000, you have got, when you put these things in groups—this is what I want to call to your attention—the banks are here 100 per cent; the Committee of Merchandise Creditors represents $180,000 out of 442; or 40 per cent. [fol. 141] The Government—the Federal Government is here with the proposition that: We are so interested in re-establishing business, in putting four thousand people back to work in this establishment, that we release the Receiver from our lien on this property and we will take our chances of turning it over to the new company and having the new company pay the taxes. And the State Government is in the same position. Now of the total amount of creditors, sir, who are represented on this Committee who passed on this thing, you have got 62 per cent on the Committee who went all over this thing and traded this thing down to the very bottom. Now I am not going to go over and burden you with this settlement; but I defy any lawyer to say, in this picture, with the possible exception of that question of interest, which was the result of business trade—because, after all, if the Court please, on a composition in bankruptcy, a different offer than this might have been made—and when I say it, it is to Mr. White's distinct advantage, that the proposition from first to last was only this: "I want to pay 100 cents on the dollar." Now, on a proposition that in liquidation, to take the creditors' own figures,

in liquidation won't bring them ten cents on the dollar, White says: "I will go to work for you. I am going to hold this common stock, which is not worth five cents apiece and it gives me no power because I am supervised at every turn—until I pay your notes and retire your stock or redeem your stock, then my stock becomes worth something." And my friend, Mr. Vise says: "Give us a contract that he will work for us." Well, if the Court wants that, he will give it; and we will give it for the simple and obvious rea- [fol. 142] son that his only hope can be to get hard to work and make the greatest amount of profit to retire this stock at the earliest possible moment, because, from that point on, his stock becomes of value and not until then.

The Court: Is your objection as to dividends modified in any way by the statement of Mr. Stern, to the effect——

Mr. O'Connell: No, sir.

The Court (continuing): —that the redemption will be prorated——

Mr. O'Connell: No, it is not, sir, because that does not take care of dividends at all. It is entirely possible that the money will be tied up for an indefinite period of time without any income on that money. I have two prime objections. One is: I do not think anything like an adequate reason was given to me why the creditors, as long as they are in there, should want control and have three out of five. The second one is that interest should be paid upon that money. There is about $800,000, this gentleman says. The interest on that is about $50,000. That would not be felt by a corporation which made the huge amounts that he has rattled off here. These creditors should not be in the position where they may be, under the terms of this agreement, tied up for ten or fifteen or twenty years and not get any income on the money in the meantime. The creditors should not have to finance this man without any income on their money through that period of time.

Mr. Stern: Well, if these creditors were in there for ten or fifteen years, this business would not have been a success; it would have failed before that and we would be worse off than we are now.

The Court: What is the objection, if the business is [fol. 143] thought to be of sufficient value to pay off these creditors within two years, of providing for a dividend for this preferred stock—cumulative dividend, after two years?

Mr. Stern: I was just going to say to your Honor, first bear in mind, if you will, please, that we have got to redeem, through 1932 and '33, these notes. I am perfectly willing to say that beginning January, 1936, if the stock is not redeemed, we will pay 6 per cent dividend.

Mr. O'Connell: Some of the gentlemen said they expect it will be done within two or three years, they hope.

Mr. Stern: Right.

Mr. O'Connell: Let them take their dividends——

Mr. Stern: When I am talking of 1936—in 1932 we have got the notes to pay; I say beginning January, 1936——

The Court: What is the aggregate amount of the notes?

Mr. Stern: The aggregate amount of these notes will be about $160,000.

The Court: Well, if the business is at all prosperous in these times, you ought to pay off the notes without any difficulty within a period of two years.

Mr. Stern: Yes, sir.

The Court: And then there ought to be an incentive provided for you to retire as quickly as you can, reasonably, with the exercise of good judgment, of the preferred stock.

Mr. Stern: There is that obligation, your Honor.

The Court: There is that obligation; but it seems to me that if you had that preferred stock bearing cumulative [fol. 144] dividends, say from the expiration of the notes, that there is a greater incentive provided for effort to pay off the stock.

Mr. Stern: Now, will your Honor, in that connection, bear this in mind: We are taking this loaded with $157,000 worth of taxes which we have got to pay off and which we have had the Government's committal on that they will take over a period of time; so that we have got to pay, in addition to those notes, which are $160,000, another $160,000 in round numbers; and all I have said to your Honor is, those notes are a firm, fixed commitment that we have got to pay in 1932 and '33. Now, if we got to 1934 and we have got two years to keep their money, 1934 and '35, and I said, beginning January, 1936, if you add to that cumulative 6 per cent dividends, you give Mr. White the incentive to retire it and you penalize him if he does not retire it. With that modification—I expect I will be criticised for consenting without consulting him—but if and because of the fact that he has stated his expectation, and these

figures justify his statement in that regard—I am willing to make the commitment in his behalf now, to give them cumulative dividends after 1936, of 6 per cent; so that we shall have no reason for holding the money.

Mr. O'Connell: If your Honor please, that is entirely unsatisfactory. They talk of taking this loaded with obligations. They are taking an awful lot of assets; don't let them forget that fact.

The Court: Yes; you are taking all the assets of the creditors and wiping them out, with the exception of 20 per cent of their claims and subjecting them to the hazards [fol. 145] of the enterprise. Now, most reorganization schemes, either by way of composition or otherwise, provide for the payment of some cash to the creditors so that they get something out of it; and where the whole thing is being taken——

Mr. Stern: That is impossible, in this situation.

The Court: Well, granting that it is, neverthless, if the business enjoys the prospects that you tell me that it does——

Mr. Stern: Yes, and in the past demonstrated.

The Court: Yes—well, it seems to me that you reasonably ought to be able to pay off, within those two years, these notes plus your tax claims, or else to secure them in some other way so that the creditors can get their money.

Mr. Stern: Yes, I agree with that, sir, but what I——

The Court: And then, if your profits for the succeeding years are not great enough to pay the dividends, in the judgment of the Board of Directors, the most that can happen is that those dividends are cumulative for the benefit of the holders of the stock, as against the days of the prosperity of the corporation.

Mr. Stern: Yes, sir.

The Court: I feel that there is a good deal of merit in what has been suggested, that certainly Mr. White, who is going to get whatever there is left——

Mr. Stern: After the retirement.

The Court: —after the retirement, should have an incentive to retire that stock and give the creditors their money at the earliest practicable time.

[fol. 146] Mr. Stern: Yes; now, I have asked the Court to accept the modification; that gives us a year of leeway.

The Court: That is five years and a half, practically.

Mr. Stern: No; we have got the notes that come through 1932 and '33.

The Court: Well, I know, but they are due beginning——

Mr. Stern: They are due beginning January, 1932.

The Court: And what is the last month?

Mr. Stern: July, 1933; two years.

The Court: And then you want to put them off two and one-half years more before there is any interest on the stock?

Mr. O'Connell: There is no interest on those notes, if the Court please.

The Court: I should think you ought to be willing at any rate to so modify your plan so that beginning at the expiration of a period of six months subsequent to the last maturity of the notes, that dividends at the rate of 6 per cent will begin to accumulate upon this stock.

Mr. Stern: Does your Honor mean beginning six months —or, July, 1933 we pay the last note, and your Honor means January, 1934?

The Court: If you are not redeeming the stock at that time, or even if you are redeeming it, that nevertheless, on such stock as is still outstanding the dividends should be cumulative.

Mr. Stern: In other words, that means a cumulative dividend of 6 per cent beginning January——

Mr. O'Connell: No; beginning July, so that it will be payable the following January.

The Court: No; I will give them six months.

[fol. 147] Mr. O'Connell: That is really another year, then?

The Court: No; it is six months. It means that your dividends are beginning to run from the first day of January, 1934.

Mr. Stern: That is right. In other words, the last note being paid in July, we devote the interest to the cumulative dividends beginning January, 1934.

Mr. O'Connell: That gives them two and one-half years use of our money in the business, your Honor—I am only speaking for my own client; I am not voicing anybody else's ideas, but I am still firmly convinced—I see no valid objection to the request that the creditors have control, three out of five, during this period.

Mr. Stern: I will tell you what the objection is, if your Honor please: You cannot kill personal endeavor. Mr. White has run a successful business for twenty-five years. The only way he is ever going to face his customers and the public is, that he is in charge of this business and that his stock is the voting stock; he has got entire supervision. Now, you have not got a man here, if the Court please, against whom a solitary word as to his honesty has been said. Now, if you take——

The Court: I agree with you to this extent: that if Mr. White will agree to devote his time and attention to the furtherance of the interests of this new corporation during the period that these notes and this preferred stock is outstanding, and to no other business, that then he perhaps should have the power of determining, as it were, the management of the business; because it is largely a one man business and one in which his personality will have to go if [fol. 148] it is what you have told me here today.

Mr. Stern: Now, as to that, if I may interrupt your Honor —as to that, I am perfectly willing to agree, except as to the definition of "no other business." That it shall not exclude his right to handle his present real estate holdings.

The Court: I think that is correct.

Mr. Stern: I am perfectly willing to agree with counsel for the creditors to deliver such an agreement on behalf of Morris White as a part of the consummation of this plan.

The Court: And that his services are unique and peculiar to this business.

Mr. Stern: Yes, sir; alleged and admitted.

The Court: Now, I am simply telling you the way the thing strikes me. Now, another thing: If this thing goes through, also I think what should be provided is this: That the fees payable, incident to the reorganization and which will have to come out of such assets as are here, shall be subject to the approval of the Court.

Mr. Stern: As to that, sir, I have no word to say. That is these gentlemen you have got to deal with.

Mr. O'Connell: I am going back to that point a little bit; I do not think that any adequate financing has been shown here——

The Court: Will you wait a minute? I have not said that I am going to do it yet; I have not said I am going to ap-

prove at all. I am simply asserting what is going to be done here on certain things that have occurred to me.

Now, I want to go back to the point that I raised some time ago, and to which reference has just been made.

[fol. 149] Mr. Stern: Yes, sir.

The Court: What are the commitments, if any, of the banks to furnish adequate financing to the new corporation, in the event of approval of the reorganization?

Mr. Stern: As to that, all I can say, sir, is, your Honor heard what Mr. Weisman said, representing his bank, and Congressman Sirovich was here; he is the President of the Industrial National. All these banks have said—there are two Jersey banks and two New York banks—I won't say all of them—but four of them have committed themselves to further financing.

The Court: Well, if the thing goes through and the reorganization is approved, can there be any assurance here that these banks will advance the funds that are necessary to carry on? The Receiver has already issued certificates to the extent of $25,000.

Mr. Stern: That is all taken care of.

The Court: I grant you that; but if you are going ahead tomorrow, figuratively speaking, you have got to have some cash in hand.

Mr. Stern: We have.

Mr. Weisman: I want to say this, your Honor. I have gone to Mr. White and I said, "Mr. White, my banks have told me to say to you that if you need money to run this business, we are prepared to make a straight loan." He said to me, "Mr. Weisman, I thank you very much, but I have taken that up with the C. I. T. and they are prepared to finance me to the fullest extent. We don't need money now."

The Court: Is there anybody representing the C. I. T. here?

(No response.)

[fol. 150] Mr. Stern: These negotiations have been going on and I have been a party to them. They are ready to enter into the picture.

Mr. Weisman: I have spoken to them and they have confirmed that arrangement to me.

Mr. Stern: There is not any doubt about that, sir, banks or no banks.

Mr. O'Connell: If your Honor please, we feel that before we would be in any position to make up our minds as to how much new financing would be needed, or just how much it would take, there should be a statement submitted to us as of today, as to what they have on hand and what they will need.

The Court: How much, Mr. White, do you think you will need in the way of cash to begin?

Mr. White: I have closed a deal ten days ago with the Commercial, Mr. Blumenstiel and Mr. Nat. Walker, the minute we start to work we will get all the money we want.

The Court: How much do you need?

Mr. White: Your Honor must get my factoring of the finished inventory, under present conditions. We must go to work immediately to fill in our finished inventory. That is about 150 or $200,000—our finished stocks were all broken up, and under the Receiver we were not in a position to operate. We don't need any money to operate at all; we have all we want; we are in business the minute you tell us to go ahead and start to work.

Mr. Glass: Your Honor, anticipating the pertinency of the present question, I took the trouble last night to work up some figures bearing on the ability of the company, as reorganized, to function——

The Court: Before you come to that, we will take a five minutes' recess.

[fol. 151] (After a five minute recess, the hearing was resumed as follows:)

Mr. Stern: If your Honor please, I have given you practically all the figures and the kernel of this situation.

The Court: Did you want to say something, Mr. Glass?

Mr. Glass: Yes, your Honor; I worked up some figures last night, bearing on the situation, realizing how important it was to see ahead for a little as to how this company could function; I found the situation, assuming that the Receiver was to at present liquidate, would be as follows: There would be cash on hand, over and above the Receiver's liabilities, including outstanding Receiver's certificates and including the obligations on the judgment of $54,000, there would be free accounts receivable of $67,000.

The Court: Those are regarded as good?

Mr. Glass: Those are regarded as good, and experience during the receivership has indicated that they are high-grade accounts.

Now, the third item, the inventory item, the basis of calculation there is the basis adopted by the Creditors' Committee upon the basis of continuing in business; that figure would be $462,500.

That would make a total asset position, without taking any cognizance of the miscellaneous frozen assets, intercorporate claims and so forth, of $583,500.

Now, this would be the liabilities position:

The administration expenses, which have been estimated at $50,000; the preferred claimants, taking the Government's claim at its maximum, plus the State claim, total [fol. 152] $158,500. During the first six months, or at the end of the first six months, 20 per cent.—or rather, the total notes, 20 per cent. of the debt, will be $160,000. So that the total liabilities that the new company would start with, preferred and non-preferred, would be $369,000, against total assets of $583,000.

Now, within the first six months these would be the requirements, as I see it:

The company would have to meet the $50,000 of administration expenses out of the current assets. Notes would mature aggregating $30,150.

Now I understand that while there has been no agreement entered into as yet, the informal commitment of the Government has been obtained that the payment that had been acceptable to the Government prior to receivership, of $750 per week, would be acceptable from the reorganized company. The State, I understand, has similarly indicated that it would take the same treatment that the Government has taken. So that that would require a weekly payment of $1150; which, in six months, would require $29,900.

Now, those total requirements within the six months, without going into the question of operating cash, would be $120,000; as against which the company would start with $54,000 cash, $67,000 receivables, or $121,000. So that it could liquidate within the first six months, assuming that these arrangements were consummated, Government and State, the first series of notes, administration expenses

and the preferred liability during that period.

Now, the company, in time, has the inventory as a basis of financing its operations. That inventory would have to be manufactured further into accounts receivable, factored and cash received.

[fol. 153] The Court: How long would it take before the inventory would begin to be converted into receivables?

Mr. White: Raw stock or finished?

The Court: How soon would you begin to sell goods?

Mr. White: The finished stock, the next ten days; and the raw goods, the middle of July.

The Court: And have you got some substantial orders now that you could fill?

Mr. White: Not a dollar. We could get business by the hour.

Mr. Stern: That is due to the fact, sir, that they have not been manufacturing and the customers have not sent in their orders.

The Court: What will be the salaries per year?

Mr. Stern: That is to be fixed by four out of the five directors of the company, sir. It has not been agreed to, but the plan contemplates that four out of the five directors, which takes in the representatives of the creditors, must agree to those salaries, whatever it is, and it has not yet been taken up.

The Court: And three of them would be Mr. White's nominees, one the bank's, and one the merchandise creditors'?

Mr. Stern: One the merchandise creditors'; but at least one of those two would have to agree before those salaries could be fixed. In other words, we cannot fix the salaries arbitrarily. They must be fixed by the representatives of the creditors.

Mr. O'Connell: Can we get an idea approximately what they will be? That is a small margin of creditors, one vote.

The Court: Have you any idea what they will be?

[fol. 154] Mr. White: It is my idea, your Honor, if business will be good, I expect they will pay me well for my work. I am going to work for them for the next two years.

Mr. Palmer: Judge Knox, one of the merchants in the room here is from Boston; he has been here for several days. He wanted to know whether or not it was not possible—he thinks the lawyers have done all the talking so far—he wants to know whether a creditor can be heard. I

present Mr. Berman. He is a creditor for $20,000. He wants to go back to Boston and say Judge Knox heard him. I think even Mr. Baker, of the National Surety Company, who is opposing—I think he will do well to listen to the gentleman from Boston.

Mr. Berman: I represent not only the amount of money; this involves the shut-down of the entire industry and we have got to get started, and if Mr. White does not get started soon, we don't get started and——

The Court: What do you supply?

Mr. Berman: Metal, sir. As far as our experience has been in matters like this, where, in bankruptcy cases or some similar cases, we never got anything out of it any other way; I don't remember any occasion. We get this talk about the assets; we very seldom get more than 5 per cent at the most, or 10 per cent. And here I know Mr. White, and I don't mind telling you, your Honor, that there is not a second White; never was, and there never will be; not only from my standpoint, but from the standpoint of the entire industry. I have been connected with it, if your Honor please, for at least twenty-seven years, and I remember what it was then and what it is now.

[fol. 155] The Court: How much did you sell him in the course of a year?

Mr. Berman: Well, we have had the good fortune of selling Mr. White as much as half a million dollars a year; we practically depend upon him; the entire industry lacks confidence to go ahead. For instance, I don't know what to make for the fall, I don't mind telling you. If Mr. White would put in pigskin, pigskin would go; if Mr. White put in white, white would go; if green, green would go—all the others are like a lot of sheep; I don't know where I am at; I don't know what to make. Now I will just show you, if your Honor please. I have some stock that I was told by people to make up. Now, here is a stock consisting of about 750 dozen, and there is not a customer for it, after telling me to make it up. And I want your Honor please to remember that it is not just the creditors alone that are involved in it; it is the very future. I don't mind telling you, if, God forbid, anything happened to Mr. White, I would be out of that business—I don't know what I would be going next—and I am not only myself, but three hundred families in our works—we are shut down; we made up that stock, but what

good is it? Ask any of these supposed-to-be leading manufacturers in the City of New York; ask them what will go? They don't know; they don't know. I make up this; this is no good. I make up this; this is no good. I made up nine samples for Mr. White this spring, and every one of them was good; and then they all go—he starts, they all start—you will have to excuse me, your Honor; I never had the good fortune to——

The Court: You are doing all right.

Mr. Berman: I am a little excited about this. I was connected some years back with the Belber Trunk & Bag Com-[fol. 156] pany, a very large institution, and we had a retail chain of stores, and we had to close them up; they were not paying; and the result is a Receiver had it—somebody appointed by the bank in Philadelphia; and the most they could realize out of it, after fiddling around with it a number of months, $100,000. I went out, and in three months—Mr. Belber is right in his office right now in 136 Madison Avenue, and you can verify this, your Honor—and I went out, knowing my goods and knowing where to sell it, and got $280,000 out of it; because I knew that this particular thing would go in this place; this particular thing would go in that place. And I myself, your Honor, am fearful of the estate, that if it is not handled by a man that understand it, that it is not worth a darn. They can only be utilized by a man that really knows what he is about, and there is no man in New York City who would deny this fact: That Mr. White is Mr. White; that he is not an accident; he didn't get that money by not knowing well; he got that money because—I am proud of the fact, your Honor, to express my opinion for the first time in front of this man, that I was one of them that knows him and understood him—what he said was right; he created that business, just where it was, because it is him; and I am fearful, if your Honor please, for any other way or procedure but to allow him to go ahead; and I can go back home and put the other boys to work, and we have got just about 5,000 dozen that is finished up to the pickle, ready to go ahead.

Mr. Stern: That is a business term, your Honor.

The Court: I understand it.

[fol. 157] Mr. Berman: Thank you, your Honor.

Mr. Baum: Mr. Cash is familiar with this matter, your Honor. Our office is the attorney of record, but I think he

can tell you more directly how the Commission arrived at the decision to make this liberal concession.

Mr. Cash: If it please the Court, I would be sorry to speak to the prejudice of any position or interest that any creditor has. I have been connected with the Commission for ten or eleven years, and now as counsel; and this matter was placed before Mr. Bernard. Of course, the Government has its priority, and we are not authorized to surrender that priority, but it is willing, and I will state on the record here, that I would be prepared, under the direction of the Head of the Bankruptcy Section of the General Counsel's Office, and really at the direction of Mr. Bernard, the Commissioner, we have prepared a writing in which we agree that our claim may be transferred from the old corporation to the new—or, rather, against the new in lieu of the old; and we are willing to let the taxpayer go along as it has gone, and pay the taxes on comfortable instalments.

Now, the Commissioner was impressed with the information that this meant the employment of a number of people. Of course, the Commissioner of Internal Revenue is not in the Department of Labor, but using the old term that you don't want to kill the goose that lays the golden egg, the Commissioner wanted to preserve the status of this taxpayer, if he could, so that he could pay future taxes. He has been a very liberal taxpayer; we made investigation there and found that over a period of years, or in recent years these taxes have been paid very liberally by this tax- [fol. 158] payer, and we want to preserve it; and like my friend from Boston, I believe the Commissioner expressed the opinion that this man is a genius in this particular work and we feel that the only way to preserve the rights of the creditors and incidentally and also to preserve the rights of the Government, is to permit this new organization and to relieve this man so that he can work out his problems, the problem of paying the Government as well as the ordinary creditors. Now, of course the Government has a fixed tax liability against this concern for the year 1928. It is our suggestion and the District Attorney's Office has it in writing, that the tax be assessed against the new corporation as the transferee of the old. In that way we reserve our priority, but we are willing to go along as we have in the past, and take instalments that will not be burdensome, or that will be comfortable to the corporation.

Mr. Baum: That agreement has been drawn up and has been submitted to the Committee, and we would like to submit at as part of the Court's decree.

Mr. Guerin: If your Honor please, on behalf of the surety companies, we just want to say that we have been pictured here as trying to stand in the way of this plan and setting out to destroy. That is not our position at all. Our position is simply two-fold. When first we came into this picture—we came into it on Friday morning—I immediately proceeded to the Clerk's Office and got out the papers and found there was nothing to show the financial position of this company; there is nothing on which to base a real conclusion as to how we are—if they will supply us with a statement as to the condition of this——

[fol. 159] The Court: Mr. Glass gave figures here a few moments ago.

Mr. Guerin: Well, can't they get that up and supply it to the opposition so that we can analyze it and determine whether or not we have a chance under such a plan. And, your Honor, there have been persistent rumors of side agreements, that have gone further now than mere rumors.

The Court: You can put anyone you want on the stand and examine them.

Mr. Guerin: That is what we want; we want the right to examine, as Mr. Tuttle suggested this morning.

The Court: You can examine now.

Mr. Guerin: Will you give Mr. Tuttle the right to examine? He wants to examine.

The Court: He is busy up at this trial.

Mr. Palmer: Why don't you examine? You are the lawyear in the case.

Mr. Guerin: I would rather have Mr. Tuttle examine. He wants to examine.

Mr. Wise: If we could have some of those figures and have an opportunity to go through those, we may be in a better position to conduct such an examination.

The Court: You can have the figures here.

Mr. Guerin: Will you fix that after Mr. Tuttle is through this afternoon?

The Court: No; I have other engagements. You can conduct the examination here and put somebody upon the stand—you can put Mr. White upon the stand.

Mr. Stern: Certainly.

The Court: And examine right now. I will hear you at two o'clock if you want it, and you can go into whether there are any outstanding arrangements with anybody that have been made.

[fol. 160] Mr. Stern: Judge Knox, I am perfectly willing to go on record, as far as I am concerned, that there has been absolutely no promise, direct or remote, of any kind to any creditor, other than on the basis that is before your Honor. And I am sure the attorneys for the Creditors' Committee, and I am sure Mr. Glass can speak for themselves.

Mr. White: We have been in receivership for the past five and one-half months; I have not been able to draw a dollar out of this business; the entire thing is out of my supervision, out of my control.

The Court: If you want, I will put it over until two o'clock.

Mr. Guerin: If your Honor please, I don't want to tie it up—in the first place, can we have any figures by two o'clock?

Mr. Glass: We have them.

The Court: Write out the figures there now and give them to him now, as to what this Committee has found, as to the going value and as to the liquidation value.

Mr. Guerin: And what is on hand now.

The Court: Yes; and what is on hand now.

Mr. Palmer: And the Irving Trust Company has got those figures.

The Court: And come back here at two o'clock and we will make some decision. If you want to put Mr. White upon the stand and examine him as to whether there has been anything here that has not been disclosed, you may do so.

Mr. O'Connell: I have no information as to any side agreements. It would be a fishing expedition, as far as I am concerned.

The Court: You are still opposed?

[fol. 161] Mr. O'Connell: I am opposed; my position is that I think the creditors should get three out of that five until they are out of there, and that I am firmly and positively convinced—this man says he is going to work for the creditors—he is working for himself.

The Court: Of course he is, and in order to make a success, he has got to work for the creditors.

Mr. Palmer: You don't want the cart to lead the horse, do you? That is what you want to do.

Mr. Wise: Suppose we concede the genius of Mr. White and the ability to take the industry and rejuvenate it. His very actions in the past have proved his inability as a financial man and——

A Voice: If it please the Court, I happen to be a member of that Committee and I have been on it just as well as the rest of the members. I would like to say this: I am a creditor to the amount of $19,000. Now, I have not the slightest worry that Mr. White won't make that $19,000 good. I am prepared to give him 50,000 more on top of that 19. Now, if I am willing to gamble, without any certainty, and with only two men on the Committee, I would like to know why the rest of these men——

The Court: What do you supply?

The Voice: We do two and one-half million dollars in that industry—silks.

The Court: That is the feature of the case about which I would have some question as to the propriety of taking out of Mr. White's hands the power of determining what shall be the policy of the new concern.

Mr. O'Connell: He could have that, sir, without running the corporation. He could be General Manager, with very fixed clauses giving him full power as to the policies and sales and all that.

[fol. 162] The Court: Well, if he has got that, why hasn't he got the power to run it in toto, so to speak? Because if he, as General Manager, engages upon a business policy that should not meet or did not meet with the approval of the directors of the concern and they immediately cramped him so that he could not carry out what he wished to do as General Manager——

Mr. O'Connell: That would be so—let us assume that to be so; then they are cramping themselves; they are the ones that own this business, and it is their own self-interest; but they should be in a position, your Honor, to make the decision as long as their money is still in the business. It is their self-interest to see that he gets every aid.

The Court: On the management proposition, is the situation such that Mr. White's three nominees can vote and control the corporation in all of its activities; or does one of the other directors have to coincide?

Mr. Stern: On all matters, sir, that would affect Mr. White personally, whereby he would get any dividends from the corporation, one of the other directors have got to concur. On the question of the general policy of the business, it was the deliberate and profound consideration of every man on that Committee, and is of every creditor but these two, that the one thing you cannot kill in Morris White—you must not kill his incentive and he must be in command of this business in order to make it a success.

Mr. Weisman: May it please the Court, the Creditors' Committee, with an absolute—without exception, have said: "We do not want to run this business. We want Morris White to control it. We have got our own business." And [fol. 163] I want to say to your Honor, on the practical aspects of the case, and I say sincerely, it would be the greatest of calamities to saddle three men outside of that business with the responsibility for this business; they have their own business. What these creditors say is: We want White to run this business, but we want to know what he is doing. If he is doing anything wrong, we want to be in a position to stop it; but we don't want to run this business." And I say, from long experience with these things—not in this Court, but where banks have been taken into the situation: We do not want to run the business. If we have to run the business, we might as well close it up. The creditors say: "We don't want to run this business." These gentlemen don't want to run it. These other creditors have got their own businesses to run. Their judgment is not as good as White's, and they have said to me, and I repeat to the Court: "We don't want to run this business. If we thought we could run the business better than White, we would wind it up and go into it ourselves. But we want to know what is going on, Mr. Weisman; put us in a position where we know what is being done. We don't want to run it."

Mr. Stern: May I have one observation, your Honor. You could not find a substantial creditor here that would come in as one of three and run that business, for this

reason, sir: They are dealing with competitors; these leather goods houses, like R. Neuman and Hausman and the rest of them are dealing with competitors of Morris White; they won't sit in and manage Morris White's business and hope to sell merchandise to competitors. They say, very frankly: "It is your business to manage; it is [fol. 164] your job, and we have confidence in your ability and sagacity. We want to know what is going on so that if anything does happen, we can immediately have our veto power there." If you put Morris White in the position where he is going to be somebody's office boy, you kill whatever genius his creditors say he has; you kill his incentive; and I would not blame Mr. White for a minute, sir, if he would say "I won't do that sort of thing at forty-two years of age."

Mr. O'Connell: If your Honor please, I don't see why these gentlemen persist in misinterpreting me. I see a clear distinction between control of a business and management of a business. You are now handing over to him the Board of Directors so that he controls three out of five, and that Board of Directors will have the sole and exclusive right to deal with the assets which are going into this new company. I don't say they should sit down and say he should make this kind of a bag or make that kind of a bag; but I do say that they should be at least in a position of control, if they think that control is necessary in any particular point.

Mr. Weisman: Well, what do you mean? I would like to understand from you, just what do you mean? Tell us.

Mr. O'Connell: I am explaining it.

Mr. Weisman: Well, say it so that we will know it. What do you mean, besides these abstractions: We want the three on the Board but we don't want to do this—now, what do you want to do? Maybe I can show you where it has been provided for, if you will tell me what you want; let us hear it.

Mr. O'Connell: As I understand it, there will be turned over to this new corporation assets of a million dollars or [fol. 165] so—the figures come too fast.

Mr. Weisman: That is too bad; there may be a lot of other things that may be coming too fast.

The Court: Stop that.

Mr. Weisman: The business is being turned over. Now, what control do you want of the business?

Mr. O'Connell: My point is this, your Honor: Assets are going to be turned over—may I ask to what extent?

Mr. Weisman: To an entire and complete extent; there is no question of that.

Mr. O'Connell: All right; a million dollars—I don't know what they are. You are giving it completely over to the gentleman who owes all this money.

Mr. Weisman: Well, that is not so.

Mr. O'Connell: You are giving it to the Board of Directors of the new corporation which he controls; is that right or not?

Mr. Weisman: That is not so.

Mr. O'Connell: Is it true that the only time when four votes are necessary of that Board of Directors is with respect to fixing executives' salaries?

Mr. Stern: No; it is more. It is anything where his personal matters come in conflict with the business. Aside from that, the gentleman loses sight of this, sir: that Morris White is devoting, at least under your Honor's say-so, three years of his life, to what? To making that common stock worth something; and they have all got to be paid out 100 cents on the dollar and 6 per cent interest, cumulative dividends, before his stock can be worth a dollar. Now, what is he going to do, with no selfish motive, [fol. 166] because there the Board is in control. The only thing he has got is his management, which all the creditors say is the big thing and the greatest asset to the concern.

Mr. Weisman: The other thing that must be borne in consideration is that these creditors must get 20 per cent, which is over and above anything that he can now get, and if they do not get that at the fixed maturity, all this control means nothing; they walk in and close up the business.

Mr. O'Connell: Your Honor, I just expressed my thought.

The Court: What is your claim; $4,000?

Mr. O'Connell: $4500—it is money; I don't think it should lessen my position here.

The Court: No; I am asking you what it is; that is all.

Mr. O'Connell: It is $4500, judgment creditor. I still have that thought, that the creditors should be in control there.

The Court: Do you want to examine anybody in connection with this agreement?

Mr. O'Connell: Not now, sir. If I had time to go into the figures——

The Court: Do you want it at two o'clock?

Mr. O'Connell: It would not do any good at that time, I don't think, your Honor.

Mr. Wise: Your Honor, I think the decree should also contain at least the approximate salaries to be paid.

Mr. Guerin: One other thing, your Honor: Are these figures to be sworn to by the Receiver?

Mr. Glass: The Receiver will swear to no figures.

Mr. Guerin: I would like to get a statement—a sworn statement fro· the Receiver.

[fol. 167] Mr. Glass: May it please your Honor, there is no basis for any suspicion of the Receiver——

Mr. Guerin: No such question is suspicion.

The Court: No; but these are the figures which this Committee, as I understand, have arrived at.

Mr. Palmer: Yes; of certified public accountants.

The Court: Those are the ones that have been set up.

Mr. Guerin: Will the accountants swear to it? Let's have them certified by somebody.

The Court: Those are the figures which they have stated that they made.

Mr. Glass: Yes, sir.

The Court: All right. Do you want to examine here at two o'clock?

Mr. Guerin: Well, I want to examine. The question is, Mr. Tuttle wants to examine; that is the situation.

The Court: Of course, I would be glad to accommodate him, but I don't know when, because I have all of my appointments here that are fixed and determined.

Mr. Guerin: Suppose I see him at the lunch hour and let you know at two o'clock just when we can go on, when is convenient—how about tomorrow afternoon?

The Court: No, I think I am filled up tomorrow afternoon, as far as that is concerned.

Mr. Guerin: Tomorrow morning, about nine-thirty?

Mr. Palmer: In the first place, if your Honor please, Mr. Tuttle can do one thing; he can ask Mr. Marcus, his own client, on whose Board Mr. Morris White was, who Mr.

Morris White is. Mr. Guerin is a very capable lawyer—[fol. 168] surely Mr. Saul Myers would not keep him as a partner if he wasn't; why is he such a blushing violet that he must get tongue-tied? Why does he need counsel all the time?

The Court: The only difficulty with that is that this matter has been pending here for some time and it is now on the return day that you come in—I want to give you any reasonable opportunity that can be given, consistent with the Court's other engagements.

Mr. Guerin: Well, let me report back to you at two o'clock as to when Mr. Tuttle will be free—he may be free before.

Mr. Weisman: May it please your Honor, there are other lawyers in this case besides Mr. Tuttle.

The Court: Now, please don't argue about that; I understand the situation.

How many people would you employ there, Mr. White, if you go back into business?

Mr. White: Immediately would be four or five hundred.

The Court: What do you think will be a reasonable sum to count as expenditure for executive work in the organization for the next year?

Mr. White: I have been working on that for the last couple of days. We are slicing our overhead, the minute we commence working, if your Honor please, close to $400,000 a year. I personally drew 150 a year, and I am slicing it to nothing.

The Court: Well, you do not mean to say that you are not going to draw anything for the next year, do you?

Mr. White: Well, it is not up to me what I will draw; it is what the Committee will decide.

The Court: I know; but you control three votes on the [fol. 169] determination of what you can draw. What I want to get at now is what you think will be a reasonable sum to set aside, as it were, for your salary and those of the other executives, over the next year.

Mr. Stern: May I interrupt, if your Honor please. The only executive would be Mr. Morris White. His brother, Abe White, who had a 25 per cent interest in the business, Mr. Morris White having 75; he was a salesman; he was on

the sales end of it. There are no other family members in the picture; all the others are employees; so that it would only be as far as Abe White and himself are concerned; and Abe White's salary has been less in the past even than he would have earned if he had charged the usual salesman's commissions.

The Court: I would like to have some general idea as to what you think it will be.

Mr. Stern: I can understand Mr. White's embarrassment, because he wants to leave that to the Creditors' Committee to say.

The Court: He ought to have some amount in view. He is not going to start there without some idea of the amount.

Mr. Stern: Well, I am perfectly frank to say to your Honor that up to this minute Mr. White has not discussed that with me as his adviser. We have left it as a matter to be——

The Court: What does the Creditors' Committee think about it?

Mr. Weisman: The matter has not at all come up.

The Court: Well, I think it is a thing that ought to be brought up as far as that is concerned, so that we can have [fol. 170] some idea of what is going to be the carrying charges of this property if it is going to be turned over here. I just don't like to buy pigs in pokes.

Mr. Stern: I would like to say to your Honor that last December I went to his bank, and the manager of that bank agreed that Mr. White's drawing should be $6300 a month; instead of drawing $6300 a month I think he drew $5,000 a month; and I think Mr. White is hopeful—that was $60,000 a year—and I think Mr. White is hopeful, in the reduction, of bringing it below that sum.

The Court: Well, if he feels that he should have $50,000 or $60,000 a year for his income for services rendered, that is——

Mr. Stern: I have just spoken to him, sir. He is willing to say now that his request will not be for a sum in excess of $5,000 a month. And that is subject to the approval of the other members of the Board, whoever they may be; but it will not exceed that sum.

A Voice: I would much prefer to leave it just to the Court: I mean, I don't like to be objecting particularly to

the man's salary; but after all, we have heard that he was going to work for the creditors, and these are times of depression; he has a great deal at stake here now. It should be much more advantageous if it was a percentage of the profits or something like that; but that is just the situation I am seeking to guard against. If that $60,000 goes out in salary, that preferred stock might be there forever.

Mr. White: My drawing was 150 a year and my expense was quite heavy. I am going to deprive myself of all that I had in life to make good my obligations. I am the one, [fol. 171] and the Committee has forced me practically to make good their obligations. The business for the last fifteen or twenty years has averaged over half a million dollars a year net, your Honor. Now, I am not selling this country short at all. We are going to have a fair fall and in 1932 I am not going to stop at five million dollars, I am not going to stop at six million dollars. With the Commercial Investment Institution in back of us, we can get all the financing we want, and I am almost sure I am not going to disappoint the creditors or disappoint the surety companies, and pay the obligations before I am a year and a half or two years older.

The Court: Do you want to come back at two o'clock, Mr. Guerin?

Mr. Guerin: Yes, sir, if you will make it two; I may be five minutes late, because Mr. Tuttle does not get down until a quarter past one.

(Recess until 2 P. M. this date.)

After Recess—2 P. M.

A Voice: If your Honor please, I have just been informed—I was engaged in another court all morning—but I have been informed that there is, perhaps an examination or some such proceeding to take place this afternoon, and Mr. Tuttle has just been informed by a man from our office—he is still engaged in the Court of General Sessions—and has requested that an application be made that the [fol. 172] examination or proceeding about to take place be adjourned upon the basis of that engagement in Court, and I am now making such an application.

The Court: Well, until when?

The Voice: Until such time as your Honor would please to set it that won't conflict with that engagement——

The Court: I will be glad to extend any reasonable courtesy to Mr. Tuttle, as far as that is concerned, but he took this engagement with that engagement over there pending.

The Voice: That is quite true, sir, but the original time set for the hearing in this proceeding was four-thirty, which was after the close of the ordinary Court day at the Court of General Sessions.

The Court: I think that someone ought to be able to go on here, as far as that is concerned, if you want an examination. This matter has been set for a couple of weeks or more and quite a considerable number of persons are here in connection with it, and while I certainly do not want to foreclose Mr. Tuttle or anyone else, my own engagements, and I take it that those of counsel, are such that it is quite inconvenient to put it over when I have the time to give to it today.

The Voice: Well, insofar as I am familiar with the facts, of course I appreciate the Court's feeling about the matter, but I don't know of any reason why there should be any haste in this matter.

The Court: Well, you have a good deal of haste in it, I should say, for the reason that if the matter is to go through, that now is the season, of which advantage should be taken, according to the statements that are made here to me.

[fol. 173] The Voice: Of course, we are not asking that the matter be put over indefinitely or anything like that. We just want——

Mr. Guerin: Your Honor, the situation is this: that any examination of Mr. White—he wanted to examine Mr. White on this entire situation, but on the other matter that I spoke about, we will sit down tonight and get out an affidavit for you.

The Court: Affidavit as to what?

Mr. Guerin: As to what we have on the so-called side agreement.

The Court: Well, what affidavit have you? Can't you state that here and can't you make inquiry now and find out whether there is any foundation in the matter?

Mr. Guerin: Well, the affidavit is that certain people have been offered the sum of 25 cents on the dollar.

The Court: Well, let us find out if that is true. If you have any information on it, examine Mr. White now and ascertain whether it is or whether it is not; if you have any proof to counteract that, well and good.

Mr. Guerin: Well, I don't want to be in the position now of examining Mr. White on it until I am more definite—the people from whom this information came—I want to pin them down on it and get their affidavits.

The Court: Who are they?

Mr. Guerin: They are supposed to be a couple of creditors in this case.

The Court: Well, let us subpœna them and get them down here and ascertain the fact. You can get them here as easily as you could get them at your office.

[fol. 174] Mr. Guerin: All right; if I can do that, fine.

Mr. Stern: May we inquire who they are?

A Voice: Your Honor, I don't think it is fair now to make any statement in open Court until the facts are absolutely sure, as I see it, and I think we should have someone under oath before making any statement to the Court.

Mr. Weisman: I must submit, your Honor, that in my humble judgment I think this is merely a cover for delay. As for myself, I am perfectly willing to submit myself to examination. There has never been a case that has been more open and above-board than this one. This last-minute claim of side agreements, I say to your Honor are utterly preposterous. If there was any question about it, I want your Honor to believe me when I say that I would be the first one to say take all the time; but to come in here with nebulous, theoretical claim that there has been side agreements made, when none of the people in the case know anything about it—I am willing to submit myself for examination and when everybody connected with the case will probably submit themselves for examination—I think it is stretching a good thing too far to ask for an adjournment on these grounds.

Mr. Guerin: We want to be perfectly fair, Mr. Weisman; we don't want to delay you or tie you up, and I don't want it even to appear that I made the statement until I have a sworn statement. Can I be fairer?

Mr. Weisman: You are not fair, because it has come to my attention that the delay that has already ensued has cost this business the sum of approximately $100,000; no [fol. 175] inconsiderable sum, when this is all seasonable merchandise that must be put in work and every day's delay is very serious; and I am not speaking for White; I am speaking for the creditors of this concern, who want this thing to realize as much as possible.

The Court: Mr. White can take the stand.

Morris White (residing at No. 600 West End Avenue, New York City), being first duly sworn, testified as follows:

Examined by the Court:

Q. Mr. White, you are the Morris White who was the head of the corporation that is now in receivership?

A. Yes, sir.

Q. And it is you who expects to manage and control the new corporation?

A. Yes, sir.

Q. If this reorganization plan be approved?

A. Yes, sir.

Q. Have you made any agreements of any kind whatsoever with any creditors of the corporation now in receivership, whereby such creditor or creditors will receive any sum or any favor other than that which is proposed to be given to all of the unsecured creditors under the plan of reorganization?

A. No, sir. I haven't got a dollar in the world to make such offers.

Q. Well, whether you have got a dollar in the world or not, have you made any promise to anyone that hereafter you will in any way, shape or form favor such a person or persons over other creditors of the same class?

A. No, sir.

Q. You have made no agreement whatsoever?

A. Or promise; to no one, sir.

[fol. 176] Q. What do you think the value of the machinery is that you now have in your place, as a going concern?

A. As a going concern?

Q. Yes.

A. A couple of hundred thousand dollars.

Q. And what, in your opinion, would be realizable upon it if it were sold at auction?

A. At top, $10,000.

Q. 10,000. And what, in your judgment, is the value of the material in process that you now have in the place?

A. You mean raw material, or merchandise in process?

Q. Merchandise in process.

A. None at all. We have not got any.

Q. Well, what about the raw material?

A. Well, the raw material will take about three years to work it all up; you can't do it in less.

Q. What do you think the value of that material is as a going concern?

A. As a going concern, close to eight or $900,000.

Mr. Stern: How much, Mr. White?

Mr. White: About $900,000.

Q. And what do you think it would be worth as material, if sold at auction?

A. I don't think there is any market today for it.

Q. What does it consist of, principally?

A. Mostly high calibre leathers; a lot of fabrics, embroidered fabrics, which we must make up in the next three or four weeks or else we will be stuck, because this year it is navy, and next year we can't sell navy fabrics. If we could get them in work, with the manufactured and finished stock we have on hand, we could get a very good break the next couple of weeks.

[fol. 177] Q. How long will it take, if this reorganization plan be approved, to turn out merchantable merchandise?

A. Twenty-four hours.

Q. And do you think there is market for it at present?

A. There is a market. The retailers are all just waiting for me to get started to give them some merchandise.

Q. Notwithstanding the present depressed state of business?

A. Yes, sir.

Q. How much do you think that you will be able to realize gross for merchandise, say in the next thirty days?

A. During the month of June?

Q. Yes.

A. Conservatively, $300,000.

Q. Of good bills receivable?

A. Yes, sir; at a profit.

Q. How much of a profit?

A. Not very much; I would have to manipulate the manufacturing; about $200,000 in goods and clean up $170,000 with merchandise we have in operation—I mean merchandise in stock—I don't think we could make 5 per cent on that, I don't think.

Q. Do you believe, as a business man having experience in this line of activity, that if this reorganization plan be approved, that you can, within the next two years, pay off these notes that it is proposed to be given to creditors?

A. I believe, your Honor, that between now and the end of the summer, I expect to give my 150 creditors and five bankers, a nice little dinner, and have a check to them in full right on the plate, on the 20 per cent of notes.

Q. When is it that you have that hope?

A. By the end of the summer of 1931.

Q. You have that much confidence in your ability to——

A. We have made it the last twenty-four years. I haven't [fol. 178] lost my millions in the handbag business—that is counsel's suggestion——

Q. Well, you have lost your money in real estate ventures and the stock market?

A. No, sir—I have lost on the stock market—but I have lost an awful lot in the Bank of U. S. As a director of the institution, I carried four or 5,000 shares and have been indirectly connected in some of the deals there, and I was cleaned. The handbag business showed enormous profits in twenty-four years, and I drew more than $150,000 a year and $50,000 expenses.

Q. It is not your expectation, I take it, to withdraw any of the funds of the new organization with which to go into outside ventures?

A. No, sir. Mr. Weisman tells me I can't do a darn thing in the new organization, outside of doing my work and cleaning up my indebtedness, and then I get back my business.

Q. Are there any of the assets of the corporation now in receivership which have not been disclosed to the Receiver?

A. You mean any patents and so forth?

Q. Any assets of any kind.

A. The firm owns a couple of patents.

Mr. Stern: No; the Judge's question is, Mr. White, whether there is anything that the firm owns that the Receiver don't know about.

Mr. White: No.

Q. Have any of the present creditors of the defendant [fol. 179] corporation received any preference of any kind?

A. You mean the creditors, your Honor?

Q. Yes.

A. No, sir.

Q. That is, you have not secured any of them, other than the bank creditors which have accounts receivable pledged with them?

A. Well, your Honor, before we went into Equity receivership we were practically in receivership five long months, controlled by the banks; so I could not withdraw a dollar out of that business——

Q. Just answer my question as to whether or not any of them have received any preference?

A. No, sir.

The Court: Is there any question that any one of the counsel for the opposition desires to ask Mr. White?

By Mr. Wise:

Q. I am informed that you have a personal indebtedness to the Morris White Corporation. I would like to know how much that is for?

A. I could not tell you.

Q. Do you know that you have an indebtedness to the Morris White Corporation?

A. Oh, yes, I personally owe the Morris White Corporation.

Q. You don't know how much it is for?

A. No.

Q. You have not any idea?

A. No, sir.

Q. Have you ever been in bankruptcy proceedings before?

A. No, sir.

Q. Has any company that you have been interested in, been in bankruptcy proceedings?

A. No, sir.

[fol. 180] Q. Have you ever been in Equity receivership proceedings before?

A. No, sir.

Q. Is there any way that you can find out what the amount of your indebtedness to the company is?

A. I think Mr. Glass will tell you.

Mr. Glass: It is listed at $137,729.68 indebtedness to the company.

Q. Do you know how that indebtedness came about?

A. Yes.

Q. What is it for?

A. What I used the money for?

Q. And how did it come about?

A. The other holdings needed some money and I took it from Morris White, Inc. and invested it in the other corporation. In other words, Morris White personally took the money from Morris White, Inc. and gave it to the Morris White Holding Company.

Q. That has been your practice for some time, to take money from one corporation and hand it to another?

A. That is right.

Q. And there is listed an asset or reputed asset of Morris White, Inc.——

A. Of a million, seven hundred thousand dollars.

Q. (Continuing:) A million, seven hundred thousand dollars due from the Morris White Holding Company.

A. Yes.

Q. When do you think that ever will be paid, if?

A. On April 19 the Morris White Holding Company has borrowed from the S. W. Straus people two million and a quarter and gave it to the Morris White, Inc. business.

[fol. 181] Mr. Stern: That is 1930?

Mr. White: 1930, April 19.

Q. Has it ever been given back?

A. No, sir. On April 19 last year, at the same time, Morris White, Inc. had obligations close to three and one-half million dollars and we got it down to this low figure.

Q. Well, what was the procedure that you took—what was your customary procedure in diverting or taking funds from Morris White, Inc. and putting them into the Morris

White Holding Corporation? Did you ever take any security for this transfer of funds?

A. No security. Morris White, Inc. and the Morris White Holding Company are the same institution—I control 100 per cent of the same stock.

Q. They are the same institution?

A. I mean, it is the same organization; it is Morris White.

Q. I don't quite understand——

A. The Morris White Holding Company is Morris White, and Morris White, Inc. is Morris White.

Q. You mean you owned 100 per cent of the stock in both corporations?

A. That is right.

Q. (Question repeated.)

A. Not of Morris White, Inc. 25 per cent of that stock——

Q. How much stock do you hold in Morris White, Inc.?

A. 75 per cent.

Q. Who holds the other 25?

A. My brother, Abe White.

Mr. Wise: Your Honor, I join in the application of Mr. Guerin for a further adjournment pending a sufficient [fol. 182] study of the figures to be able to intelligently examine the witness.

The Court: Do you want to ask him anything about the assets that are—the physical assets?

Mr. Guerin: Your Honor, we do want to examine Mr. White about all these things; but the figures which were to be supplied to us at noontime, nobody will certify to them.

The Court: Why weren't you here, as far as that is concerned——

Mr. Guerin: We only came into it Friday.

The Court: I know; but why weren't you in it before that?

Mr. Guerin: Where have we been able to get the information that we need?

The Court: No one has asked for it, as I understand it.

Mr. Guerin: It is mandatory that there be filed either a Receiver's report or an accountant's report, for the benefit of the creditors. Is it incumbent upon us to go to the Receiver or go to the Creditors' Committee?

The Court: If you want any information in connection with it, application can be made for it; but this was a hearing upon the propriety of this plan.

Mr. Guerin: May I explain to your Honor why I am not prepared——

The Court: Even so, it seems to me, Mr. Guerin, that there is a great deal to lose here, so far as the creditors [fol. 183] are concerned, in delay.

Mr. Guerin: One day won't ruin it for them.

The Court: I know; but I have got appointments just as well as you and Mr. Tuttle.

Mr. Guerin: I realize that, sir.

The Court: I have got an appointment tomorrow morning which means to me quite as much as you or Mr. Tuttle, as far as that is concerned; and the convenience of the Court has to be considered too.

Mr. Stern: May I say, your Honor, that Mr. Moakes, representing the National Surety Company, who sat in on every one of these conferences concerning this matter, had before him the full accountant's report; and when this matter was finally submitted, Mr. Moakes' statement to the full Committee was: Gentlemen, I want you to understand that I cannot make any committment, but I will recommend such adjustment to my company.

The Court: Is he here?

Mr. Stern: Yes.

The Court: Is that correct, Mr. Moakes?

Mr. Moakes: Your Honor, I was not on the Committee, and when, at the last meeting, Mr. Schoenfield, one of our policy holders who had been on that Committee—it is true I attended every meeting—the first Committee passed upon the results of the offers submitted and were unanimous on [fol. 184] their report. As I told them, I could not bind my company in any way; that I would submit the entire report to my company; and I have submitted reports from previous meetings, where they discussed other methods of reorganization and other methods of stock issue; and that is about all I can say.

Mr. Stern: Mr. Moakes, isn't it a fact that you had the full accountant's report of Kline, Hinds & Finke, a photostatic copy of the full report, comprising many many pages?

Mr. Moakes: That is right.

Mr. Guerin: If your Honor please, is there any reason why at this time we cannot get some certified statement as to what the assets are? Nobody will certify to these figures.

Mr. Glass: Your Honor, I will ask exactly what the gentleman wishes? In what form of certification? I would like to satisfy him as far as possible. On April 6, the Receiver obtained from the accountants who had theretofore been acting on behalf of the creditors, Kline, Hinds & Finke, figures as of that date. Now, the figures, insofar as cash and present accounts receivable are concerned, in the hands of the Receiver, the Receiver will certify, swear to on oath or do anything else to satisfy this gentleman as to the accuracy of those figures. The Receiver can do nothing more with respect to inventory than to express an [fol. 185] opinion as to what that inventory may be worth. In arriving at such opinion it must necessarly go to people experienced in the business. It feels that in relying on the expression of the creditors, unsecured creditors who have expressed their opinion in a situation in which they are vitally interested, that that is a sound basis of reliance. Now, of course the Receiver is not going to swear to values. It will state what it has, insofar as that is requested.

The Court: Has anyone from your clients gone up and looked over these assets themselves?

Mr. Guerin: No, sir, not that I know of—have they?

A Voice: If the Court please, Mr. Schoenfield was on the Committee—merchandise sub-Committee that did the actual appraising.

The Court: Well, do you think he is competent to appraise?

The Voice: Well, he is a merchandise man and manufactures frames. Other than that, I could not say.

Mr. Guerin: This thing, your Honor, can be expedited I think to a great extent if all of the members of the opposition are given a certified set of figures—we don't care who certifies them, whether it is their accountant or whether it is the Receiver, but we must have that.

Mr. Glass: Would the gentleman kindly state what figures he wants certified?

[fol. 186] Mr. Guerin: What figures we want certified? We want the position of Morris White, Inc. as of today, as to liabilities and assets; that is all.

Mr. Glass: The Receiver will be glad to give a certificate as to what assets in the way of an inventory, it has come into possession of. That is the most the Receiver can do. The Receiver accounts for receipts and disbursements.

The Court: As to what the valuation is, is a matter of opinion and appraisal.

Mr. Glass: That is correct, sir. And during the noon hour I went over in detail with the attorneys for the opposition all those figures, so far as I could, and answered every question that was asked.

Mr. Guerin: Does the Receiver, or you, Mr. Glass—do you know how many bags are on hand, how many frames are on hand, how much merchandise in process of manufacture is on hand?

Mr. Glass: It is a matter of simple count.

The Court: Can you tell, Mr. White?

Mr. Guerin: If you can tell, why can't somebody get up a statement and submit it to us?

The Court: Can you tell what it is?

Mr. Stern: If the Court please, this copy of that report of the Committee on Merchandise Inventory, which was signed by five members of that Committee, was submitted to Mr. Moakes with the rest of the Committee's reports, [fol. 187] and has always been in his possession, and that your Honor has heard much about in the course of this discussion. It stated the different classes of merchandise that went into the inventory and it stated in the first column the valuation as taken by the accountants from the books. It stated in the second column what it would realize, in their opinion, in the open market, at Receiver's sale. And it stated in the third column what the value of the merchandise as a going concern was. And the figures on the books showed $1,249,490; that on Receiver's sale they would realize $357,000; and that as a going concern it would realize $717,000. That is the Committee's report of five merchandise men engaged in various lines; there was a leather man, a frame man, and an ornament man on it. Most of this merchandise was sold by these committeemen to Morris White, Inc.; and that is what has happened.

Now, since that event, since this appraisal was made, the actual liquidation of the finished merchandise by the Receiver has realized substantially less than even this Committee fixed as its valuation. That has been due to the

change in the market. There is a difference of approximately $350,000 between the valuation at a Receivership sale and the valuation as a going concern. It is that $350,000 that is one of the elements that prompted this entire Committee to recommend this readjustment, so that this concern could pick up that difference and turn it over to the [fol. 188] creditors.

Mr. White: Outside of the plant, your Honor, which is worth a couple of hundred thousand dollars, of which the Committee didn't take the inventory; the appraisers considered, if it is in operation, can't be duplicated for less than a quarter of a million dollars.

The Court: If it were sold, it would be junk, I suppose?

Mr. White: Yes, sir.

Mr. Glass: It may be pertinent to say, your Honor, that there were some prospective purchasers sufficiently interested to call upon the Receiver and examine the stock with a view of making a bid here for the assets. So far as I know, no bid has crystallized.

Mr. Palmer: It may be pertinent also that Mr. Guerin tell you this: that at lunch hour we went to Hahn's Restaurant and saw Mr. Tuttle, and he spoke to Mr. Tuttle and at the same time, he spoke to Mr. Singer, of the Bank of U. S., with which bank Mr. White was connected; and there was no secret about what Mr. Singer said about the worthwhileness of this man and that the only way that the creditors could possibly succeed was to put Mr. White back in harness—I was under the impression, and I am surprised that my impression was in error, because Mr. Guerin is a very broad-minded man—that Mr. Guerin would come back here and say to the Court: "From what I have heard of this situation, [fol. 189] here is one situation where lawyers' judgment should step to one side and merchants' judgment and the world's judgment should be taken into consideration."

Mr. Guerin: Your Honor, the only way I know of getting rid of this—will your Honor direct the Receiver to file a report?

The Court: Well, this report that he has got here, so far as that is concerned, is part of the proceeding.

Mr. Glass: It is part of the record now.

Mr. Guerin: Where is it on the record now, Mr. Glass?

Mr. Glass: I thought I read the figures into the record this morning; and during the noon recess I took the trouble

to go over—I read the figures for all of the attorneys on the opposition that cared to inquire.

The Court: What is the sum of the creditors' liabilities that you represent?

Mr. Guerin: $135,000.

Mr. Stern: How? We would like to know about that.

Mr. Guerin: The National Surety Company represents $60,000.

Mr. Palmer: What are the names of the companies? Let's hear the names.

Mr. Guerin: London Guarantee, representing approximately 24,000; the American Credit Indemnity, representing another—about another 27,000. That is the total liabilities.

[fol. 190] Mr. Stern: May I ask your Honor, that he state the names of the creditors that——

The Court: Yes, I think so.

Mr. Stern: Will you state on the record, pursuant to the direction of the Court, the names of them?

Mr. Guerin: Those are all creditors who have filed claims with the surety companies for their indebtedness against Morris White, Inc.

The Court: List them here. Let us see what they are.

Mr. Guerin: Artistic Wire Forming Company, Inc., for $48,049.54——

Mr. Palmer: What is the amount of your policy?

Mr. Guerin: That is the amount of the claim filed. L. Gewelbe & Company, Inc., $6,796.07. G. Levor Company, $4,538.86. They are the claims filed with the National Surety Company. The following claims are filed with the American Credit Indemnity Company: Davis Leather Company, Ltd., $7,445.56. Davis Leather Company, Inc., $2,685.54. Fred. Rueping Leather Company, $7,076.94. John H. Elliott Leather Company, $3,079.32. Moritz Eichner, $1,219.73. Hookless Fastener Company, $5,833.08. The following claims are those of the London Guarantee & Accident Company: Claim held directly by the company by assignment: Rex Novelty Works, $19,329.42. Alma Leather Company, $4,304.93. And the Hunt Rankin Leather Company, $1,118.58.

Mr. Palmer: Your Honor pardons me: Mr. Baker is in [fol. 191] the room and Mr. Guerin is in the room, and Mr.

Guerin knows less about it than Mr. Baker does. In these policies the bonding company limits the amount of insurance they give.

The Court: What is your face liability on these claims?

Mr. Palmer: If you deduct everything, what is your case liability?

Mr. Guerin: I am not prepared to say.

Mr. Palmer: The question is, how much you pay even if you get licked.

The Court: Haven't you some definite amount?

Mr. Guerin: No, we have not.

The Court: Do you mean there is no limit of liability on these various policies?

Mr. Guerin: We are in no position now to say what the limit is.

The Court: Why, don't they write for a top amount?

Mr. Guerin: They write for a top amount sometimes; not always.

The Court: What did you do in this case?

Mr. Guerin: I never had these policies; that is why I am not prepared to say.

The Court: Does not the company have here a statement as to what its top liability is?

Mr. Guerin: No, sir, no one of the three, and I have requested it.

Mr. Palmer: Well, Mr. Baker is here. He can tell you.

Mr. Guerin: He cannot. I have requested it for two days. They are working on that for me.

The Court: It does not seem to me that should take much time.

[fol. 192] Mr. Guerin: It is only a question of detail, Judge.

Mr. Stern: May I say to your Honor that the attorney who was here this morning stated in answer to my inquiry, so far as G. Levor & Company is concerned, he replied by saying that the National Surety had denied any liability. That is the situation.

The Court: Have you paid any of these claims?

Mr. Guerin: The only claim paid is that $19,000 claim.

Mr. Palmer: You didn't pay a cent. The National paid it.

Mr. Guerin: I represent all of them.

Mr. Glass: If your Honor please, it is pertinent also to direct your attention to the fact that of all of the creditors enumerated, all but two are indicated on the Receiver's records as having attended the First Meeting of Creditors held pursuant to call of the Receiver, at which detailed figures were furnished. The only two that were mentioned that were not noted as attending were the Alma Leather Company and the Hunt Rankin Leather Company.

Mr. Stern: May I say to your Honor this: The Rex Novelty Company is the one claim that they say has been filed and paid. That is held by the London Company; they paid $19,329. The Rex Novelty Company is a creditor of Morris White, Inc. to the tune of $43,882. So that clearly you find a claim there where this creditor is liable and loses $13,000; and the Rex Novelty Company, Mr. George Rosenberg, the [fol. 193] executive head of that, was a member of this Committee and advocated affirmatively the acceptance of this reorganization. So in spite of the fact that this company has paid a $19,000 loss, Mr. Rosenberg, with $14,000, is still in favor of the proposition.

Mr. Guerin: Your Honor, I come back to the same question; all this argument may be unnecessary——

A Voice: Your Honor, I am one of the creditors for $38,000, and I honestly believe—I never attended any meetings, but I know the concern, and I know just the way this thing is coming around, that unless the creditors work with Mr. Morris White, the creditors would not get a nickel; and I speak as a creditor—I am not protected, I am not insured—let Morris White reorganize his business and get back again and make good so that we will realize some money on it at some future date.

The Court: My view, stating it very shortly, is this:

That if the estimate of value which has been placed upon the assets of the defendant corporation is anywheres near correct, it means, if this concern goes into liquidation, that the general creditors will get little or nothing as a result, due to the fact that machinery, such as I imagine is contained in that place, would bring only junk prices, and that the silks and leather that might be devoted to the manufacture of ladies' hand bags, would be little more than remnants and that it would be bought at a highly depreciated value by whomsoever might wish to enter this busi-

ness; and that the priority claims, such as the Federal Gov-
[fol. 194] ernment's taxes, and the State Government taxes, would take practically all that might be realized from such a sale. The experience that I have had in seeing businesses such as this liquidated has been of a character as to lead me to believe that not much is to be hoped for from that standpoint; and that in addition to the small sum of money that would probably be derived from such a sale, there would have to be deducted the expenses of administration; the auction sale of the assets would be an expensive matter, in the way of lotting, I should think; and that if liquidation takes place I should be surprised if creditors would realize more than between 5 or 10 per cent, at the utmost.

I agree that the proposed reorganization is more or less of an attempt by Mr. White to lift himself by his bootstraps, in that there is here no capital with which to finance the new concern, save such as he thinks may be received on his business record from others who are favorably disposed toward him. All of us know, unfortunately too well, the present condition of business. Mr. White is hopeful; whether he is overenthusiastic or not, I do not know; but certain it is, I think, that quite as much is to be anticipated from such effort as he might make to rehabilitate himself, as is to be had from liquidation. I know of no fact in the case, at least none has been brought to my attention, of any suggestion of wrong doing on the part of Mr. White in the management of this business, save and except the freedom that he exercised in taking assets of this corporation and devoting them to his other business ventures. Of course, on any reorganization, that should not and must not be done. He apparently, from those who know him best, en-
[fol. 195] joys a good reputation in the business community as a man of skill and ability in this particular line of business. He agrees here, as I understand, with such modification as was made this morning, that he will devote himself to this business for the next three years and will engage in no other business save such as he is now committed to in his real estate ventures, and he will enter into no opposition business to this pocketbook work; and so, if he justly bears the reputation for ability and skill that has been given to him here this morning, you will have his services.

The sum of money which he will receive for his services, as announced this morning, seems, in my opinion, to be quite large. It may be that that sum should be scaled somewhat until the concern, if it is to be reorganized, finds what it can do under present market conditions. If he can "deliver the goods", to use the vernacular, he should, of course, be well paid for his services; and it would be most gratifying, I am sure to everyone, if, at the end of the Summer he could carry out his expressed hope of giving his creditors a check for the 20 per cent. I trust that he may be able to do so. But whether he is or not, it seems to me that perhaps the creditors, over a time, stand a better show of getting their money than they do at the present time if the property be liquidated. If it should be liquidated, no distribution could be had for several months at any rate; and if his hopes are at all well founded, the creditors will certainly be in a better position at the same relative time by going ahead than they will by stopping now.

I have decided, in view of all the circumstances, to approve this reorganization, subject to the suggested changes [fol. 196] that I made this morning in connection with it; and you may present an order along those lines, so far as the interest is concerned, so far as the preference on the preferred stock is concerned, at the expiration of 1933; January 1st, 1934.

Mr. Guerin: May I get notice, Judge?

The Court: Yes; serve a copy; and get it up as soon as possible, on one day's notice. And administration expenses will be subject to approval by the Court. And I hope that the thing can go through and that it will work out all right.

Mr. Stern: May I suggest one modification if the Court please, or perhaps two. There are a large number of claims here which will eat up the sum of $3,200, and they are in varying small amounts. I would like to suggest to your Honor that we be permitted to dispose of those claims, where any one claim does not exceed $100, upon a basis other than that contemplated in the reorganization plan.

The Court: How much do they aggregate?

Mr. Stern: I am proposing to his Honor this modification: That the corporation be permitted to make disposition outside of the offer made, of any claim that does not

exceed $100. The total amount involved in the disposition of those claims (and that will take care of 50 or 100 claims), $3,200.

Mr. Glass: There are 193 creditors that will be eliminated by that.

The Court: 193? Very well.

Mr. Stern: May I ask, too, if your Honor please—this offer provides for its acceptance within five days of its completion. We may have some difficulty with the State [fol. 197] Government in getting the papers. May I ask that it be extended to the 15th, so that we are not in default?

The Court: Of course, this is all conditioned upon getting these taxes out of the road.

Mr. Stern: Yes, sir; but I don't want to be in default here by reason of some delay we may have with the officials.

Mr. Glass: Now, if your Honor please, one other motion that comes on today, and that is the application to make the receivership permanent. That was also adjourned to today. That was adjourned to the same date upon the theory that the Court's determination of the motion just disposed of would bear upon that proposition.

The Court: What do you want me to do; to continue that for another week?

Mr. Glass: I would suggest to your Honor that that be continued for another week. In the meantime it may be——

The Court (interposing): I think I will put it over for another week—as far as that is concerned, it may be necessary for the permanent receiver—I will make it permanent now, as far as that is concerned. That is the best thing to do.

Now gentlemen, one of the moving factors in leading me to make this decision is Mr. White's statement that he can get busy and get material into production at a very early time; and I think that you had better get on the train and go to Albany and get that matter straightened out immediately.

Mr. Stern: It is in process already, sir.

The Court (continuing): So as to get them through here and let us see some real money coming into this business as quickly as possible.

I will grant each one of the opponents here an exception to my ruling.

[fol. 198]

Morris White, Inc.

Statement of Assets and Liabilities as at April 6th, 1931

Assets

Current Assets:			
Cash		$5,614.60	*5,000*
Accounts and notes receivable, less reserve for uncollectible accounts of $17,363.00 ($251,409.42 pledged as collateral on bank loans, see contra.)		301,852.12	*30,000*
Debit Balances Accounts Payable		4.12	
Claims receivable, less reserve of $35,560.00		.....	
Merchandise inventories, based on January 31, 1931 physical inventory and adjusted to April 6, 1931 by subsequent purchases and estimated cost of sales			
Manufactured Stock	(a) $508,020.81		
In Process	(a) 12,600.00		
Raw materials	(b) 720,587.28		
		1,241,208.09	*357,000*
Listed Securities—Schedule I		4,061.41	*5,000*
Total Current Assets		$1,552,740.34	
Other Assets:			
Listed securities—(pledged as collateral for notes payable of $21,568.82, see contra) Schedule I		5,500.00	
Unlisted securities—at cost—Schedule I		11,000.00	*5,000*
Loans receivable—Lysmore Holding Corp		1,850.00	
Due from officers and employees—Schedule II		156,520.53	
Thrift account—Bank of United States		300.00	
Machinery, equipment, etc.—less depreciation reserve of $48,797.15		74,265.01	*5,000*
Ridgewood, N. J., property, less mortgage of $7,006.18		5,493.82	
Investments in and advances to subsidiary and associated companies—Schedule III		2,277,714.89	
Deferred Charges—Schedule IV		30,866.45	
Total Assets		$4,116,251.04	

NOTE.—Figures in italics were in ink on original copy.

[fol. 199]

Liabilities and Capital

Current Liabilities:			
Accounts payable—for merchandise	Schedule V	$288,828.66	
Acceptances payable—for merchandise	Schedule V	108,216.46	
			$397,045.12
Accounts payable—for expense—Schedule VI			19,463.55
Sundry			
Notes payable—banks—unsecured—Schedule VII			262,500.00
Notes payable—banks—secured by assigned accounts receivable of $251,409.42 (Schedule VII)			179,116.81 (*1*)
Credit Balances on Accounts Receivable			2,155.64
Federal Income taxes			80,624.36
New York State Franchise tax			57,697.69
Due to employees			3,976.96
Accrued payroll			16,388.04
Accrued expenses			31,463.31
Total Current Liabilities			$1,050,431.48

	(1)	*179,116.81*
		871,314.67
Notes payable (secured by collateral, see contra)		21,568.82
Total Liabilities		$1,072,000.30
Capital:		
Capital stock authorized and issued 20,000 shares at $100 par	$2,000,000.00	
Surplus, April 6, 1931	1,044,250.74	
		3,044,250.74
		$4,116,251.04

(a) Accelerated liquidation value of $339,600, estimated by Mr. Morris White.
(b) Value in liquidation depends upon manufacture into finished goods.

NOTE.—Figures in italics were in ink on original copy.

[fol. 200] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF CHARLES H. TUTTLE IN OPPOSITION; SWORN TO MAY 27, 1931; SUBMITTED AND FILED MAY 28, 1931

The appellees reserve the right, by agreement of all parties, to object on the argument of the appeal that the affidavit of Charles H. Tuttle was submitted and filed after the decision was rendered by Judge Knox.

STATE OF NEW YORK,
County of New York, ss:

Charles H. Tuttle, being duly sworn, deposes and says:

I am appearing on behalf of the following parties in the above entitled proceeding to oppose on their behalf the acceptance and approval by this Court of the offer made by Lily White, dated April 29th, 1931, and submitted to Irving Trust Company as Receiver herein.

1. National Surety Company, insurer of the following accounts with said Morris White, Inc.:
Artistic Wire Forming Company, Incorporated.
L. Gewelbe & Company, Incorporated.
G. Levor Company, Incorporated.

[fol. 201] From information received from the representatives of the National Surety Company your deponent shows to this Court as follows:

The National Surety Company has issued to each of the foregoing policies of credit insurance. Claims have been filed with the National Surety Company by said policy holders in the sums of:

Artistic Wire Forming Company, Incorporated	$48,049.54
L. Gewelbe & Company, Incorporated	6,796.07
G. Levor Company	4,538.86

The claim of said G. Levor Company, Incorporated, is based upon a judgment entered in its behalf against Morris White, Inc.

2. American Credit Indemnity Company, insurer of the following accounts with said Morris White, Inc.:

Davis Leather Co. Ltd.
Davis Leather Co. Inc.
Fred Reuping Leather Co.
John H. Elliott Leather Co.
Moritz Eichner.
Hookless Fastener Co.

From information received from representatives of the American Credit Indemnity Company your deponent shows to this Court as follows:

[fol. 202] American Credit Company has issued to each of the foregoing, policies of credit insurance. Claims have been filed with the American Credit Indemnity Company by said policy holders in the sums of:

Davis Leather Co. Ltd.	$7,445.56
Davis Leather Co. Inc.	2,685.54
Fred Reuping Leather Co.	7,076.94
John H. Elliott Leather Co.	3,079.32
Moritz Eichner	1,219.73
Hookless Fastener Co.	5,833.08

3. London Guaranty & Accident Company, Ltd., insurer of the following accounts:

Rex Novelty Works.
Alma Leather Company.
Hunt Rankin Leather Company.

From information received from representatives of the London Guaranty & Accident Company, Ltd., your deponent shows to this Court as follows:

London Guaranty & Accident Company, Ltd., has issued to each of the foregoing, policies of credit insurance. Claims have been filed with the London Guaranty & Accident Company, Ltd. by said policy holders in the sums of:

[fol. 203] Alma Leather Company	$4,304.93
Hunt Rankin Leather Company	1,118.58

The claim of the Rex Novelty Works in the sum of $19,329.42 has been assigned to said London Guaranty & Accident Company, Ltd.

Annexed hereto is the affidavit of T. M. Garrison, Assistant Secretary of the National Surety Company, which sets forth the grounds upon which the foregoing parties rest their opposition. In addition, deponent respectfully submits that the moving papers and the statements as to the financial condition of Morris White, Inc., and as to this action made upon the argument upon the return of the order to show cause, show that this case is not one justifying an equity receivership at all; and that the court has no jurisdiction to proceed in equity.

Wherefore deponent prays that said offer made by Lily White, dated April 29th, 1931, and submitted to Irving Trust Company, as Receiver herein, a copy of which is attached to the order to show cause dated May 12th, 1931, returnable before this Court on the 26th day of May, 1931, signed by Hon. John C. Knox, United States District Judge, be rejected and disapproved by this Court. Deponent further prays [fol. 204] that the complaint herein be dismissed and the receivership vacated.

Charles H. Tuttle.

Sworn to before me this 27th day of May, 1931. Isaac Davis Hall, Notary Public, Queens Co., etc. (Seal.)

[fol. 205] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF T. M. GARRISON IN OPPOSITION; SWORN TO MAY 26, 1931; SUBMITTED AND FILED MAY 28, 1931

The appellees reserve the right, by agreement of all parties, to object on the argument of the appeal that the

affidavit of T. M. Garrison was submitted and filed after the decision was rendered by Judge Knox.

STATE OF NEW YORK,
County of New York, ss:

T. M. Garrison, being duly sworn, deposes and says:

I am Assistant Secretary of the National Surety Company. I am familiar with the above entitled proceeding.

The parties named in the foregoing affidavit of Charles H. Tuttle, oppose the acceptance and approval of the offer made by Lily White to the Irving Trust Company, Receiver, on the following grounds:

1. The petition and the papers attached thereto do not in any way indicate the possibility or probability of ultimate [fol. 206] payment in any amount to the creditors of Morris White, Inc.

2. The accountants' certificate attached to the petition shows only liabilities of Morris White, Inc. No statement is contained therein of the assets or the value thereof. Nor do the papers give any indication of the actual financial condition of the estate.

3. There is no representation which would indicate any advantage accruing to the creditors of Morris White, Inc. from acceptance of the offer. In other words, no attempt is made to show the Court, the creditors, or other interested parties, what is being relinquished in return for the notes and stock.

4. There is no concrete assurance that the offer will be fulfilled to the benefit of the creditors or that the New Company will be in as good or better position financially than was Morris White, Inc.

5. It is obviously necessary that new funds be provided in order that any readjustment plan be feasible. No source of funds is set forth in the petition or the papers attached to it.

6. It does not appear that a Receiver's report has been filed. A representative of the National Surety Company has attended every meeting of the Creditors' Committee and the only accountants' report that has been made avail-

able is that dated April 6, 1931. This report was prepared by accountants formerly employed by Morris White, Inc., [fol. 207] now the accountants for the Receiver. In order that the creditors and other parties interested may make a proper and intelligent investigation of the situation, it is necessary that a Receiver's report and a current accountants' report be filed. Unless these two documents are available to the creditors, they should not be required to consent to the acceptance of the offer. They are certainly entitled to a thorough investigation down to and including the date of the issuance of the order to show cause.

7. It has been common experience that paper settlements involving notes and the like are almost without exception unsatisfactory. This proposed offer constitutes an entirely paper transaction. Certainly some cash settlement should be required in order to indicate good faith upon the part of the offerer.

8. The length of time which would elapse under the proposed order before any liability arose, which would bind the New Company, is of grave importance. The assets of the Old Company would be in the hands of the New Company without any real control by the present creditors or their representatives during the time that Morris White, Inc. remains at the head of the new organization. Furthermore, more than six months would elapse before any liability would attach to the New Company because the first five percent note would then become due and payable.

[fol. 208] 9. No date has been fixed for the filing of claims prior to the proposed action on this offer. It is therefore impossible to determine to what extent claims will be allowed and what part of the $1,072,000 liabilities of Morris White, Inc., will be proven and allowed, or what additional liabilities over and above the said amount of $1,072,000 will be proven and allowed, and for that reason it is impossible to determine what amount in liabilities it will cost the New Corporation to purchase the assets now in existence.

10. By the provisions of the offer the New Corporation has the right to contest any claims filed against said Morris White, Inc., and the expenses of any special master appointed by the Court or any other expenses incurred in connection with the contest of any claim or claims which

may be filed against the said Morris White, Inc., or the Receiver, and such expenses shall be deemed a part of the cost of administration. It is impossible therefore at this time to determine the extent of such expenses, or in fact whether or not any moneys will be disbursed for that purpose, and the objecting creditors submit that before the offer should be accepted and approved, such expenses and disbursements should be known to them.

11. There is nothing as far as these objecting creditors have been able to find which shows whether or not the Re- [fol. 209] ceiver in its operations has made or lost money. Before any conclusion could be arrived at on this proposed offer, such a report is necessary. It may very well be, as your deponent believes, that the business of the said Morris White, Inc., was not and could not have been carried on at a profit, but in fact was carried on at a substantial loss. If such is the fact, there is nothing to indicate that the New Company would fare any better in the said business than the said Morris White, Inc., or its Receiver. For the New Company to undertake business with the additional obligation of the old indebtedness 20% in notes and 80% in preferred stock of Morris White, Inc., makes it indeed almost impossible for it to succeed, and most probably within a very short time these creditors would find themselves in a worse condition as creditors of the New Company then they now find themselves as creditors of Morris White, Inc.

12. Deponent has been informed and verily believes that much of the merchandise and other assets, including securities on hand on April 6, 1931, the date of the appointment of the Receiver herein, have been sold and/or otherwise disposed of. Deponent has been informed and verily believes that such assets were sold far below the value at which they were carried by Morris White, Inc., but due to the lack of any responsible report it is impossible to determine the value of the remaining assets.

[fol. 210] 13. From the foregoing it will be readily seen that the offer cannot be acted upon at this time for it has been impossible for these objecting creditors to determine with any reasonable degree of certainty the value of the assets of the said Morris White, Inc., the extent of its liabilities, the probable costs of administration, the probable

amount in the nature of the liabilities of Morris White, Inc., to be paid by the New Corporation for the assets of the said Morris White, Inc., the financial structure of the New Corporation and its probable responsibility, or in any other manner to intelligently determine the effect of the acceptance of any such offer as that now proposed upon the rights and probable returns upon the claims of these creditors.

Wherefore deponent prays that said offer made by Lily White, dated April 29th, 1931, and submitted to Irving Trust Company, as Receiver herein, a copy of which is attached to the order to show cause dated May 12th, 1931, returnable before this Court on the 26th day of May, 1931, signed by Hon. John C. Knox, United States District Judge, be rejected and disapproved by this Court.

T. M. Garrison.

Sworn to before me this 26 day of May, 1931. Lewis D. Baker, Notary Public, N. Y. Co. #519.

[fol. 211] UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. E. 59-126

VALERIA E. CORIELL, Complainant,

against

MORRIS WHITE, INC., Defendant

DECREE MAKING THE RECEIVERSHIP PERMANENT—Dated June 3, 1931

The bill in this cause having been duly filed, and the defendant, Morris White, Inc., having heretofore duly filed its answer admitting the allegations in said bill and joining in the prayer for relief, and the solicitor for said defendant having duly given his consent in writing to the entry of this decree, and an order having been heretofore and on April 6, 1931 duly entered herein appointing Irving Trust Company temporary receiver herein and providing that the

matter of making said receivership permanent and/or modifying said order be heard and determined on May 8, 1931, and due notice of said hearing having been given pursuant to the provisions of said order, and said hearing having been duly adjourned to May 25, 1931 and thereafter to May 26, 1931 and said hearing having been duly held on May 26, 1931 and there being no opposition to the making of said receivership permanent and no application for any modification of said order,

[fol. 212] It is ordered, adjudged and decreed:

1. That the said bill be sustained as a general creditors bill and as such enure to the benefit of all who may come in under the same by intervention or otherwise, as the Court may hereafter direct.

2. That the complainant and the other creditors of the defendant are without adequate remedy at law, and that said complainant is now entitled to the relief granted hereby, and that it is necessary for the protection and preservation of the respective rights and equities of the complainant and all other creditors of the defendant, that the properties and business of said defendant should be administered as an entirety in this suit through receivers to be appointed by this Court, in order that the rights and equities of all creditors, stockholders and other security holders be preserved, determined and adjudicated in this suit; and that it is necessary that a receiver of the defendant herein, and of its properties, should be appointed forthwith with the powers herein granted.

3. That the appointment of Irving Trust Company, as receiver of the defendant, Morris White, Inc., is hereby confirmed, and the said Irving Trust Company is hereby appointed permanent receiver of the defendant Morris White, Inc., and of all the properties of the defendant, real, personal and mixed, and of whatsoever kind and description including all lands, real estate and buildings, premises and appurtenances owned, controlled, leased or operated by the defendant, and all materials, supplies, merchandise, books of account, records and other books, papers and accounts, cash on hand, in bank or on deposit, things in [fol. 213] action, credits, stocks, bonds, securities, deeds, leases, contracts, muniments of title, bills and accounts receivable, rents, issues, profits, tolls and income accruing

and to accrue as well as all interests, easements, privileges, franchises and appurtenances and all assets and property of all and every kind, character and description whatsoever of said defendant wheresoever situated.

4. The receiver is authorized to take possession of all and singular said property and assets above mentioned wherever situated or found; to preserve, manage, maintain and operate said property including such property as the defendant holds, controls or operates; to use, manage and conduct the business of the defendant; to exercise the authority and franchises of the defendant; to discharge all public duties obligatory upon it; to protect and preserve the corporate franchises, privileges, property and assets and the corporate existence of the defendant; to preserve its property in proper condition and repair; to manage and operate the property according to the requirements of the valid laws of the various States in which such property is situated, in the same manner that the defendant would be bound to do if in possession thereof; to keep the property insured as it may deem advisable; to maintain the offices of the defendant in said district and elsewhere as of the date hereof; to employ, discharge and, subject to the approval of this court, fix the compensation of all officers, attorneys, and managers; to employ, discharge and fix the compensation of all superintendents, agents and other employees; to collect and receive the income, rents, revenues, tolls, issues and profits of the said property and to collect all outstanding accounts, things in action and credits due [fol. 214] or to become due or owing to the defendant and all dividends on stock and interest on bonds or other securities belonging to it; to make such payments and disbursements as may be needful and proper in its judgment in connection with any of the foregoing, and to hold and retain the net revenues of said property in such manner and to the end that the same may be applied under this order and under such orders as this court may hereafter make. The receiver shall be allowed six months from the date of this order (unless the time be extended by further order of this court) within which to elect to adopt or continue in force or to refuse to adopt or continue in force any lease or other contract not fully performed which may be included in the property of which it is appointed re-

ceiver whether made by the defendant or by any predecessor of the defendant. Such election may be made from time to time and shall be made by instrument in writing subscribed by the receiver and filed in the office of the Clerk of this court, and no conduct or user of the rights by the receiver or payments made by it, as rent or otherwise, or any other acts or omissions of the receiver within said period of six months unaccompanied by the filing of such written instrument, shall be deemed to conclude the receiver in respect of such election or be deemed to constitute an election to adopt or to continue in force any such contract, lease or agreement.

5. The receiver is authorized and empowered to institute and prosecute, within this judicial district or elsewhere in any court or before any officer, department commission or other tribunal and in its own name as receiver or in the name of the defendant as it may be advised by [fol. 215] counsel, all such actions, proceedings or suits as in its judgment may be necessary for the recovery or proper protection of said property or any part thereof and the discharge of its trusts, and likewise to appear in and defend any and all actions, proceedings or suits which may be instituted and prosecuted against it as receiver in or before any such tribunal. The receiver is further authorized and empowered, whether before or after any action, proceedings or suits in respect thereof shall have been begun and subject to the approval of the court, to compromise and settle, and, out of funds coming into its hands as receiver, pay claims and demands on all accounts accruing against it as receiver, after the date of this order and arising out of its possession, maintenance or operation of the property of the defendant which, in the judgment of the receiver, are meritorious and capable of adjustment on terms advantageous to and for the proper protection of the property in its charge as receiver. The receiver is further authorized to intervene in or become a party to such suits, actions, proceedings at law or in equity, including ancillary proceedings in State or Federal courts as may in its judgment be necessary or proper for the protection, maintenance and preservation of the property and assets of the defendant in carrying out the terms of this order.

The receiver is also authorized and empowered to appear in and conduct the prosecution or defense of any and all actions, proceedings or suits now pending or which may hereafter be brought in any court or before any officer, department, commission or other tribunal in which the de- [fol. 216] fendant is or shall be a party which, in the judgment of the receiver, affect or may affect the property of which it is appointed receiver. The receiver is further authorized and empowered, whether before or after any action, proceeding or suit in respect thereof has been begun, but subject to the approval of this court, to compromise and settle claims and demands on all matters which have accrued against the defendant or which have arisen out of the possession, maintenance and operation by the defendant of its property without regard to when the same arose, but no compromise or settlement of any such claim or demand shall be deemed to make the claim or demand so compromised or settled an obligation of the receiver or to free the claimant from making such proof of his claim as so compromised or settled before any special master hereafter appointed or otherwise as this court or any special master may request, and no action taken by the receiver in the defense of any such action, proceeding or suit against the defendant or in compromising or settling any such claim or demand against the defendant shall have the effect of establishing any claim upon or right in the property or funds in the possession of the receiver so as to alter or change any existing equities or legal rights of the parties.

6. The receiver shall maintain books of account and shall keep or cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the property of which it is appointed receiver, and shall preserve proper vouchers for all payments made by it on account thereof and shall deposit the monies coming into its hands in such banks as shall be selected by it and approved by the court.

[fol. 217] 7. The receiver is authorized in its discretion from time to time until the further order of this court, out of the funds coming into its hands, to pay all necessary expenses of conducting the business of the defendant or incident to the execution of this receivership including,

among other expenses, the wages, salaries and compensation of all officers, counsel, managers, superintendents, agents and employees retained or employed by the receiver as above provided.

8. All persons, firms and corporations having in their possession any of the property and premises of which the receiver is hereby appointed receiver, including all property of which the defendant is or may become the beneficial owner whether held by it or by other persons, firms or corporations as trustees, agents or otherwise, shall forthwith deliver such property and premises to the receiver and make such transfers, assignments and conveyances in connection therewith as may be necessary or proper, and each and every of the officers, directors, agents and employees of the defendant is hereby required and commanded forthwith to turn over and deliver to the receiver, or to its duly constituted representatives, any and all books of account, records, vouchers and papers, deeds, leases, contracts, bills, shares, bonds and other securities, accounts, monies or other property in his or their hands or under his or their control belonging to or in the possession of the defendant or to which it is or may become entitled, and each of said officers, directors, agents and employees is hereby commanded and directed to abide by and conform to such orders as may be given from time to time by the receiver or its duly constituted representatives in conducting the [fol. 218] operation of the property and in the discharge of its duties as receiver.

9. The defendant, its officers, directors, attorneys, agents and employees and all persons claiming to act by virtue of or under it and all officers, marshals and sheriffs and all other persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, are hereby restrained and enjoined from in any way prosecuting any suits or proceedings of any kind, nature or description against the defendant, or in any way interfering with, attaching, levying upon or in any manner whatsoever disturbing any portion of the assets, goods, monies, property and premises of which the receiver is hereby appointed, or from taking possession of or in any way interfering with the same or any part thereof, or in any way disturbing the possession of the receiver or from interfering in

any manner to prevent the discharge by the receiver of its duties in the operation of the property and premises under the orders of this court.

10. The receiver shall retain the possession of the property and continue to discharge the duties and trusts aforesaid until the further order of this court and from time to time make reports of its doings in the premises, and may from time to time apply to this Court for such other and further orders and directions as it may deem necessary and requisite in the due administration of its trust.

11. The receiver is authorized to execute in its own name or in the name of the defendant, all necessary appeal, supersedeas, injunction or other bonds which may be required by law or in carrying out this order or any other orders of this court and to that end to enter into contracts [fol. 219] with surety companies as sureties on such bonds and to pay the reasonable charges of such surety companies therefor as well as any amounts they may be required to pay by reason of signing such bonds as sureties.

12. The complainant herein and also the receiver are authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in or become parties to such suits, actions, proceedings at law or in equity including ancillary proceedings in State or Federal Courts and in the courts of any foreign country as may be deemed necessary or proper in aid of the orders issued by this court, and to apply to any such courts for such order or orders as may be deemed necessary or proper therefor. The right is reserved to the parties hereto to apply to this court for any other instructions to the receiver and the court reserves the full right and jurisdiction to make from time to time such further orders amplifying, extending, limiting or otherwise modifying this order as to it may at any time seem proper, and in all respects and at all times to regulate and control the conduct of the receiver.

13. In case of the resignation or removal of the receiver hereby appointed and the appointment of a successor or successors to the receiver who shall so resign or be removed, all the provisions of this order shall apply to such successor without further order of this court.

14. Each and every order heretofore entered herein with respect to said Irving Trust Company as temporary receiver herein, shall be with the same force and effect applicable to said Irving Trust Company as permanent receiver herein in so far as anything still remains to be done with respect to the subject matters of such orders.

[fol. 220] 15. All questions not hereby disposed of are reserved for future adjudication, and for such purpose exclusive jurisdiction of the cause is hereby retained.

Dated New York, June 3, 1931.

Jno. C. Knox, United States District Judge.

[Title omitted]

Entry of the annexed order is hereby consented to.

Dated New York, June 3, 1931.

Nathan D. Stern, Solicitor for the Defendant.

[fol. 221] United States District Court, Southern District of New York

[Title omitted]

Stipulation of The Morris White Handbags Corporation and Morris White Submitting Themselves, etc.

The Morris White Handbags Corp. and Morris White individually and severally do each appear hereby in the above entitled action and do hereby submit themselves jointly and severally to the summary jurisdiction of this court with the same force and effect as if they and each of them had originally been parties to this action and they do each hereby consent and agree that this court may by summary order or proceeding direct or order them or either of them to do any act, deed or thing that may be required by either or both of them to be done pursuant to a decree entered herein dated the 15th day of June, 1931 and or any act, deed or thing contemplated or required to be done pursuant to the offer

made herein by one Lily White which offer is dated the 29th day of April, 1931.

The Morris White Handbags Corp., by Morris White, President. Morris White. (L. S.) Abe White, Secretary. (Seal.)

[fol. 222] STATE OF NEW YORK,
City of New York,
County of New York, ss:

On this 15th day of June, 1931, before me personally appeared Morris White, who, being by me duly sworn, did depose and say: That he resides in New York City. That he is the President of The Morris White Handbags Corp., the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal, and that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Miriam G. Waterman, Commissioner of Deeds, City of New York.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

On this 15th day of June, 1931, before me personally appeared Morris White, to me known and known to me to be the individual mentioned and described in the foregoing stipulation and thereupon he duly acknowledged that he had executed the same as his act and deed.

Miriam G. Waterman, Commissioner of Deeds, City of New York.

[fol. 223] UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Present: Hon. John C. Knox, U. S. D. J.

[Title omitted]

ORDER ENJOINING MORRIS WHITE FROM VIOLATING THE TERMS OF A CERTAIN STIPULATION, ETC.

This case came on further to be heard and was argued by counsel and thereupon, upon consideration thereof, the Court ordered, adjudged and decreed as follows:

First. The annexed stipulation signed by Morris White pursuant to the decree signed by Hon. John C. Knox, dated June 15th, 1931 be and it hereby is approved as to form.

Second. Morris White is hereby enjoined and restrained for a period of three years from and after the date hereof from in any way violating the terms of the annexed stipulation.

Jno. C. Knox, U. S. D. J.

[fol. 224] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

I, Morris White, hereby agree that I will, for a period of three years commencing on the date hereof, render my sole and exclusive services to The Morris White Handbags Corp. and that I will not at any time during the said period in any way carry on or be connected with, either through stock ownership or otherwise, any other business or undertaking either for my own benefit or for or with any other person, firm, association or corporation except that I shall be free to devote time and attention to and be connected with such realty enterprises as I may now have an interest in.

I hereby admit and agree that the services to be rendered by me to The Morris White Handbags Corp. are of a special, unique and extraordinary character and I hereby consent that the order of this Court may issue presently enjoining and restraining me during the said period of three years commencing on the date hereof from in any way violating the terms hereof.

[fol. 225] I hereby submit myself to the summary jurisdiction of this Court for the purpose of enforcing performance of the provisions hereof.

Dated New York, N. Y., June 15th, 1931.

Morris White. (L. S.)

CITY, COUNTY, AND STATE OF NEW YORK, ss:

On this 15th day of June, 1931, before me personally appeared Morris White, to me known and known to me to be the individual mentioned and described in the foregoing

stipulation and thereupon he duly acknowledged that he had executed the same as his act and deed.

Miriam G. Waterman, Commissioner of Deeds, City of New York.

[fol. 226] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DECREE OF JUDGE KNOX APPROVING OFFER OF LILY WHITE—Dated June 15, 1931, being the decree appealed from

This cause came on further to be heard at this term on the order of Honorable John C. Knox, United States District Judge, dated May 12th, 1931, requiring all creditors of the defendant and any and all persons interested to show cause at the time and place therein stated why the offer made by Lily White dated April 29th, 1931 should not be accepted and approved by this Court and at such time and place to consider and act upon any other offer or offers which might then be made; and said cause was argued by counsel and thereupon, upon consideration thereof, the Court finds, adjudges and decrees as follows:

1. This Court has jurisdiction of all of the parties to this cause and of the subject matter therein involved.

2. Notice of said hearing was duly given as provided in said order of Honorable John C. Knox dated May 12th, 1931.

3. No offer other than said offer of Lily White dated April 29th, 1931 for the purchase of the assets of the de-
[fol. 227] fendant and of the Receiver's right, title and interest therein has been made.

4. The value of the assets of the defendant upon the basis of liquidation by the Receiver is substantially less than the value of such assets on a going concern basis.

5. The general creditors of defendant will realize only a small recovery upon their indebtednes if liquidation by the Receiver is had.

6. Continuance of the business under the plan embraced in the said offer of Lily White would enable the preservation of the difference between the liquidation value of the assets of defendant and the value of said assets on a going concern basis and would enable the preservation of the value of the good will of defendant.

7. Continuance of the business under the plan embraced in the said offer of Lily White would afford the general creditors a better opportunity to recover the indebtedness owing them than they would have if such assets were now to be liquidated.

8. Said offer is fair and equitable to all of the creditors of defendant and its acceptance upon the terms herein stated is in the best interests of such creditors.

It is therefore ordered, adjudged and decreed as follows:

First. The offer made by Lily White herein, dated April 29, 1931, for the purchase of all of the assets of the defendant and of all the right, title and interest of the Receiver therein, is hereby approved, subject, however, to the following conditions:

[fol. 228] (a) That the dividends that the holders of the preferred stock provided for in said offer shall be entitled to receive, as provided in said offer, shall be cumulative beginning with the dividends payable for the semi-annual period commencing January 1, 1934.

(b) That all allowances for services rendered or to be rendered in this proceeding, and all other fees incident to said offer and its acceptance, which shall be payable out of the assets of this estate, shall be subject to the approval of this Court.

(c) That Morris White file with the Clerk of this Court a stipulation, in form to be approved by the Court, whereunder he shall agree that he will, for a period of three years, commencing on the date of the signing of this decree, render his sole and exclusive services to the New Corporation referred to in said offer and that he will not at any time during the said period in any way carry on or be connected with, either through stock ownership or otherwise, any other business or undertaking either for his own bene-

fit or for or with any other person, firm, association or corporation, except that he shall be free to devote time and attention to and be connected with such realty enterprises as he may now have an interest in; and whereunder he shall agree that the services to be rendered by him to the said New Corporation are of a special, unique and extraordinary character; and whereunder he shall consent that the order of this Court may issue presently enjoining and restraining him for such period of three years from in any way violating the aforesaid terms of said stipulation; and [fol. 229] whereunder he shall agree to submit himself to the summary jurisdiction of this Court for the purpose of enforcing performance of the provisions of said stipulation.

(d) That the New Corporation referred to in said offer shall, at or before the transfer of the assets of the defendant to it by the Receiver, duly execute and deliver to the Receiver for the benefit of the United States Government a written agreement wherein and whereby the said New Corporation shall under its seal, covenant, promise and agree to pay any and all taxes legally due from Morris White, Inc. to the Government of the United States and by which agreement it shall assume and agree to pay the same, and by which agreement it shall consent that the Commissioner of Internal Revenue may assess against the New Corporation, as transferee, under the provisions of Section 311 of the Revenue Act of 1928 all taxes now assessed against Morris White, Inc. or that may thereafter be determined to have been due or be due by Morris White, Inc., and by which agreement it shall further agree that with respect to an unpaid balance of taxes due for the year 1928 the said New Corporation shall acknowledge the legality and correctness thereof and shall agree that in the event that a deficiency letter is sent to the New Corporation proposing the assessment of said taxes against the New Corporation as transferee, it will waive any right of appeal to the Board of Tax Appeals; and by which agreement it will further agree that with respect to any deficiency proposed against the New Corporation as trans- [fol. 230] feree with respect to the year 1929, that the New Corporation shall reserve the right to take an appeal from the proposed transferee assessment to the Board of Tax

Appeals, but that upon such appeal the said New Corporation shall be confined to the merits of the tax and will raise no question with regard to the Government's right to tax it as transferee, and in and by said agreement the said New Corporation shall waive any and all statutes of limitations with respect to the time within which the taxes herein mentioned may be assessed and collected against it.

(e) That the New Corporation referred to in said offer shall, at or before the transfer of the assets of defendant to it by the Receiver, duly execute and deliver to said Receiver for the benefit of the State of New York an agreement with respect to any and all taxes that may be due to the State of New York, similar to the agreement hereinbefore in subdivision "(d)" hereof provided for as to any taxes due to the Government of the United States.

(f) That Morris White and Lily White file their written consent to the entry of this decree.

Second. The Receiver herein is hereby ordered and directed to accept said offer of Lily White, subject, however, to the conditions above expressed.

Third. Upon the transfer of the assets of the defendant by the Receiver pursuant to said offer, the Receiver shall forever be released, discharged and absolved from any [fol. 231] and all liability whatsoever to the Government of the United States and to the State of New York for, by reason of, or in any way arising out of any past, present or future claim for taxes or otherwise against Morris White, Inc. and/or against Irving Trust Company, as Receiver of Morris White, Inc.

Fourth. The New Corporation referred to in said offer of Lily White may, at its option, make such settlement with any of the creditors of Morris White, Inc. whose several claims do not exceed $100, as shall be agreed upon between any such creditors and the New Corporation which settlement shall as to any such creditors be in lieu of the provision made in such offer for such creditors.

Fifth. All questions not hereby disposed of are reserved for future adjudication. For the purpose of enforcing the provisions of this decree and for the purpose of entering such further orders or decrees as the Court may hereafter

from time to time determine, the term of this Court is hereby extended and exclusive jurisdiction of the cause is hereby retained.

Dated New York, June 15, 1931.

Jno. C. Knox, U. S. D. J.

[fol. 232] CONSENTS OF THE GOVERNMENT OF THE UNITED STATES AND OF MORRIS WHITE AND OF LILY WHITE TO THE ENTRY OF THE DECREE OF JUNE 15, 1931

The Government of the United States does hereby consent to the transfer and sale by the Irving Trust Company, as receiver in equity of Morris White, Inc. of the assets of Morris White, Inc. pursuant to the offer made for such assets by Lily White, which offer is dated the 29th day of April, 1931, and

The Government of the United States does hereby consent that any decree or order that may be entered decreeing such sale by the United States District Court for the Southern District of New York, shall provide and decree that such sale and transfer of the assets of Morris White, Inc. by the Irving Trust Company as receiver in equity of Morris White, Inc. shall forever release and discharge and absolve the said Irving Trust Company as receiver in equity of Morris White, Inc., from any and all liability, if any, of any kind, nature or description for the payment by it, assessment against it or charge to it of any tax, or taxes, now due or assessed or that may hereafter be found to be due or assessable or payable by Morris White, Inc.

The foregoing consents are upon the understanding, however, that the decree or order that shall be made hereunder decreeing or ordering the said Irving Trust Company, as receiver in equity, to transfer or sell the assets of Morris White, Inc., pursuant to the offer first referred to, shall provide that upon the transfer of the said assets of Morris White, Inc., by the Irving Trust Company, as receiver, to the said New Corporation in the said offer referred to, [fol. 233] said New Corporation shall duly execute and deliver to the said Irving Trust Company for the benefit of the Government of the United States, a written agreement wherein and whereby the said New Corporation shall under

its seal, covenant, promise and agree to pay any and all taxes legally due from Morris White, Inc., to the Government of the United States and by which agreement it shall assume and agree to pay the same, and by which agreement it shall consent that the Commissioner of Internal Revenue may assess against the New Corporation, as transferee, under the provisions of Section 311 of the Revenue Act of 1928, all taxes now assessed against Morris White, Inc., or that may hereafter be determined to have been due or be due by Morris White, Inc., and by which agreement it shall further agree that with respect to an unpaid balance of taxes due for the year 1928, the said New Corporation shall acknowledge the legality and correctness thereof and shall agree that in the event a deficiency letter is sent to the New Corporation proposing the assessment of said taxes against the New Corporation as transferee, it will waive any right of appeal to the Board of Tax Appeals; and by which agreement it will further agree that with respect to any deficiency proposed against the New Corporation as transferee with respect to the year 1929, that the New Corporation shall reserve the right to take an appeal from the proposed transferee assessment to the Board of Tax Appeals, but that upon such appeal the said New Corporation shall be confined to the merits of the tax and will raise no question with regard to the Government's right to tax it as transferee, and [fol. 234] in and by said agreement the said New Corporation shall waive any and all statutes of limitations with respect to the time within which the taxes herein mentioned may be assessed and collected against it.

The foregoing agreement shall be delivered by the Irving Trust Company to the Commissioner of Internal Revenue within three days from the delivery thereof to said Trust Company.

Dated May 26, 1931.

George V. Medalie, per M. B., Asst. United States Attorney, Southern District of New York. Henry Kash, George R. Sherriff, Special Attorneys, Office of General Counsel, Bureau of Internal Revenue.

[fols. 235 & 236] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

CONSENTS OF THE GOVERNMENT OF THE UNITED STATES AND OF MORRIS WHITE AND OF LILY WHITE TO THE ENTRY OF THE DECREE

We, the undersigned, being respectively the Lily White and Morris White referred to in a certain offer made by Lily White in the above entitled proceeding, which offer is dated April 29th, 1931, do hereby consent to the entry of the foregoing proposed decree and do hereby agree to be bound by the terms thereof if said decree is entered.

Dated New York, June 12th, 1931.

Morris White, Lillie White.

Duly sworn to by Mildred Ginsberg. Jurat omitted in printing.

[fol. 237] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL FROM DECREE OF JUNE 15, 1931

The National Surety Company, American Credit Indemnity Company, London Guaranty and Accident Company, Limited, Hermann Loewenstein and G. Levor & Co., Inc., feeling themselves aggrieved by the order entered in the United States District Court for the Southern District of New York, on or about June 15, 1931, approving the offer made by Lily White herein dated April 29, 1931 for the purchase of all of the assets of the defendant and all of the right, title and interest of the Receiver therein and ordering and directing the Receiver to accept said offer and ordering and decreeing that the Receiver be released, discharged and absolved from liability to the Government of the United States and to the State of New York for, by reason of, or in any way arising out of any past, present or future claim for taxes or otherwise against Morris White, Inc. and/or Irving Trust Company, as Receiver of Morris White, Inc., upon the transfer of the assets by the Receiver pursuant to said

offer, do hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from said order for the [fol. 238] reasons set forth in the assignment of errors, which is filed herewith, and said National Surety Company, American Credit Indemnity Company, London Guaranty and Accident Company, Limited, Hermann Loewenstein and G. Levor & Co. Inc. pray that their said appeal may be allowed and that a transcript of the record of the proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., June 16, 1931.

Yours, etc., Saul S. Myers, Attorney for Appellants National Surety Company, American Credit Indemnity Co., and London Guaranty & Accident Company, Limited. Office and P. O. address: 60 Wall Street, Borough of Manhattan, City of New York. Baldwin, Hutchins & Todd, Attorneys for Appellant Hermann Loewenstein. Office and P. O. address: 120 Broadway, Borough of Manhattan, City of New York O'Connell & Butler, Attorneys for Appellant G. Levor & Co. Inc. Office and P. O. address: 11 Park Place, Borough of Manhattan, City of New York.

[fol. 239] To Olcott, Holmes, Glass, Paul & Havens, Esqs., Attorneys for Receiver, 170 Broadway, Borough of Manhattan, City of New York; Milton C. Weisman, Esq., Attorney for the Creditors' Committee, 1440 Broadway, Borough of Manhattan, City of New York; Nathan D. Stern, Esq., Attorney for Defendant, 50 Broadway, Borough of Manhattan, City of New York; Olcott, Holmes, Glass, Paul & Havens, Esqs., Attorneys for Complainant, 170 Broadway, Borough of Manhattan, City of New York.

[fol. 240] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL FROM DECREE OF JUNE 15, 1931

An order having been entered herein on or about June 15, 1931 in the United States District Court for the South-

ern District of New York, approving the offer made by Lily White herein dated April 29, 1931 for the purchase of all of the assets of the defendant and all of the right, title and interest of the Receiver therein and ordering and directing the Receiver to accept said offer and ordering and decreeing that the Receiver be released, discharged and absolved from liability to the Government of the United States and to the State of New York for, by reason of, or in any way arising out of any past, present or future claim for taxes or otherwise against Morris White, Inc. and/or Irving Trust Company, as Receiver of Morris White, Inc., upon the transfer of the assets by the Receiver pursuant to said offer;

And National Surety Company, American Credit Indemnity Company, London Guaranty and Accident Company, [fol. 241] Limited, Herman Loewenstein and G. Levor & Co., Inc., conceiving themselves aggrieved by said order, do hereby pray that an appeal be allowed to them from said order to the United States Circuit Court of Appeals for the Second Circuit, and in connection with this petition present their assignment of errors and further pray that a proper transcript of the record of proceedings and papers upon which said order was made, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

National Surety Company, American Credit Indemnity Company, London Guaranty and Accident Company, Limited, Appellants, by Saul S. Myers, Attorney, 60 Wall Street, Borough of Manhattan, City of New York. Hermann Loewenstein, Appellant, by Baldwin, Hutchins & Todd, Attorneys, 120 Broadway, Borough of Manhattan, City of New York. G. Levor & Co., Inc., Appellant, by O'Connell & Butler, Attorneys, 11 Park Place, Borough of Manhattan, City of New York.

Order Allowing Appeal

The foregoing appeal is allowed upon filing a bond for costs in the sum of $250.00.

Dated New York, June 17, 1931.

Alfred C. Coxe, U. S. D. J.

[fol. 242] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

The National Surety Company, American Credit Indemnity Company, London Guaranty and Accident Company, Limited, Hermann Loewenstein and G. Levor & Co., Inc. file the following assignment of errors on their appeal from the order of the United States District Court for the Southern District of New York entered herein on or about June 15, 1931, approving the offer made by Lily White herein dated April 29, 1931 for the purchase of all of the assets of the defendant and all of the right, title and interest of the Receiver therein and ordering and directing the Receiver to accept said offer and ordering and decreeing that the Receiver be released, discharged and absolved from liability to the Government of the United States and to the State of New York for, by reason of, or in any way arising out of any past, present or future claim for taxes or otherwise against Morris White, Inc. and/or Irving Trust Company, as Receiver of Morris White, Inc., upon the transfer of the assets by the Receiver pursuant to said offer:

[fol. 243] 1. The Court erred in continuing the administration of the estate herein as an equity cause after the evidence submitted to it showed that the defendant was apparently insolvent within the meaning and intent of the National Bankruptcy Act of 1898.

2. The Court erred in not judicially determining, when requested so to do, whether the defendant was thus insolvent within the meaning of the National Bankruptcy Act of 1898.

3. The Court erred in not thus determining whether the defendant was thus insolvent within the meaning of the National Bankruptcy Act and in not thereupon and forthwith transferring the cause to the Bankruptcy side of the Court, where the fees and expenses are regulated by the Acts of Congress or desisting from further acting in the matter on the Equity side of the Court.

4. The Court erred in attempting to compel dissenting creditors to accept, in payment of their claims, the unendorsed promissory notes of the defendant to the extent of 20% of their claims and capital stock in a new corporation to be formed by the defendant, to the extent of 80% of their claims while permitting the defendant to retain all available cash and other quick assets for the payment of fees and expenses and for working capital, in the new corporation.

5. The Court erred in refusing to hold that upon the evidence a court of equity should not continue the receivership herein.

6. The Court erred in refusing to grant the application and motion of these objectants to vacate the receivership.

7. The Court erred in refusing to grant the application and motion of these objectants to dismiss the bill of complaint in this action.

[fol. 244] 8. The Court erred in denying the application of these objectants for further time within which to investigate the so-called offer.

9. The Court erred in denying the application of these objectants that they be given an adequate opportunity through their counsel to examine witnesses under oath concerning the so-called offer.

10. The Court erred in approving terms which deprived these objectants of a prompt and fair distribution in liquidation.

11. The offer as approved by the Court is tantamount to a confiscation and destruction of the just claims of these objectants in violation of their rights under the Constitution of the United States and especially under the Fifth and Fourteenth Amendments thereto.

12. Said order and the determination upon which it is based are contrary to the law.

13. Said order and the determination upon which it is based are contrary to the evidence.

14. The Court erred in holding that it had jurisdiction of all the parties to this cause and of the subject matter therein involved.

15. The Court erred in holding that the value of the assets of the defendant upon the basis of liquidation by the Receiver is substantially less than the value of such assets on a going concern basis.

16. The Court erred in holding that the general creditors of defendant will realize only a small recovery upon their indebtedness if liquidation by the Receiver is had.

17. The Court erred in holding that continuance of the business under the plan embraced in said offer of Lily White would enable the preservation of the difference between the liquidation value of the assets of defendant [fol. 245] and the value of said assets on a going concern basis and would enable the preservation of the value of the good will of defendant.

18. The Court erred in holding that the continuance of the business under the plan embraced in said offer of Lily White would afford the general creditors a better opportunity to recover the indebtedness owing them than they would have if such assets were now to be liquidated.

19. The Court erred in holding that said offer is fair and equitable to all of the creditors of defendant and its acceptance upon the terms therein stated is in the best interests of such creditors.

20. The Court erred in ordering, adjudging and decreeing that the offer made by Lily White herein dated April 29, 1931 for the purchase of all of the assets of the defendant and of all the right, title and interest of the Receiver therein be approved subject to certain conditions contained in said order.

21. The Court erred in ordering and directing the Receiver to accept said offer of Lily White subject to said conditions.

22. The Court erred in ordering, adjudging and decreeing that upon the transfer of the assets of the defendant by the Receiver pursuant to said offer the Receiver shall forever be released, discharged and absolved from any and

all liability whatsoever to the Government of the United States and to the State of New York, for, by reason of, or in any way arising out of any past, present or future claim for taxes or otherwise against Morris White, Inc. and/or against Irving Trust Company, as Receiver of Morris White, Inc.

[fol. 246] 23. The Court erred in making the Receivership herein permanent.

24. The Court erred in retaining jurisdiction as a court of equity.

25. There was no evidence before the Court upon which it could properly base its decision.

26. The Court erred in rejecting the objections of the appellants herein.

27. The Court erred in refusing to reject and disapprove said offer made by Lily White.

Wherefore National Surety Company, American Credit Indemnity Company, London Guaranty and Accident Company, Limited, Hermann Loewenstein and G. Levor & Co., Inc., pray that said order of the United States District Court for the Southern District of New York entered herein on or about June 15, 1931 be reversed and that said National Surety Company, American Credit Indemnity Company, London Guaranty and Accident Company, Limited, Hermann Loewenstein and G. Levor & Co. Inc. be granted such other and further relief as may be just.

Dated New York, June 16, 1931.

National Surety Company, American Credit Indemnity Company, London Guaranty and Accident Company, Limited, Appellants, by Saul S. Myers, Attorney, 60 Wall Street, Borough of Manhattan, [fol. 247] City of New York. Hermann Loewenstein, Appellant, by Baldwin, Hutchins & Todd, Attorneys, 120 Broadway, Borough of Manhattan, City of New York. G. Levor & Co. Inc., Appellant, by O'Connell & Butler, Attorneys, 11 Park Place, Borough of Manhattan, City of New York.

[fol. 248] Citation, in usual form, omitted in printing.

[fols. 249 & 250] Clerk's certificate to foregoing omitted in printing.

[fol. 251] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1931

Nos. 170, 171

VALERIA E. CORIELL, Complainant-Appellee,

v.

MORRIS WHITE, INC., Defendant-Appellee; IRVING TRUST Company, Receiver, Appellee; Michael Hollander et al., Constituting a Committee of Creditors of Morris White, Inc., Appellees; National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein, G. Levor & Co., Inc., Appellants.

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Augustus N. Hand, and Chase, Circuit Judges

OPINION—Decided November 16, 1931

An order was entered making permanent a receivership, and another order entered thereafter approving an offer of purchase of the assets of Morris White, Inc., under a plan of reorganization of the corporation. The National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Limited, Hermann Loewenstein, G. Levor & Co., Inc., creditors, appeal. Decree reversed, with directions.

Saul S. Myers, Baldwin, Hutchins & Todd, and O'Connell & Butler, all of New York City (Charles H. Tuttle, Saul S. Myers, and Raymond O'Connell, all of New York City, of counsel), for appellants.

Nathan D. Stern, of New York City (Norman M. Behr, of New York City, of counsel), for Morris White, Inc.

Milton C. Weisman, of New York City (John S. Sheppard, Joseph R. Margulies, and Milton C. Weisman, all of

New York City, of counsel), for appellees Michael Hollander et al.

Olcott, Holmes, Glass, Paul & Havens, of New York City (Joseph Glass and Jerome Weinstein, both of New York City, of counsel), for appellee Irving Trust Co., receiver, and for complainant-appellee.

MANTON, Circuit Judge:

On April 6, 1931, a creditor, as assignee of a banking institution, filed a bill in equity against Morris White, Inc., a New York corporation, engaged in the manufacture of hand bags, pocketbooks, and leather goods, seeking a receivership. The bill alleged that the corporation was solvent but unable to meet its current debts, and that there was danger of destruction of its property by a forced sale, and prayed for the appointment of a receiver. The cor- [fol. 252] poration filed an answer admitting the allegations of the complaint and consented to the appointment of a receiver.

The appointment was made April 6, 1931, and powers conferred upon the receiver to continue the business of manufacturing and selling its products. Thereafter, on June 3, 1931, an order was entered making permanent the receivership. Immediately a plan was prepared for reorganization of the corporation, and proceedings were had before the court for approval of the plan. The creditors, appellants here, objected to the plan proposed, but on June 15, 1931, the court entered an order approving an offer for the purchase of all the assets of Morris White, Inc., which, pursuant to the plan of reorganization, were to be, and later were, turned over to a new corporation organized for the purpose of continuing the business. Morris White was the principal stockholder of Morris White, Inc. His wife, Lily White, made the offer for the assets of the corporation as part of the plan of reorganization. It provided that the offerer would organize a new corporation under the name of Morris White Handbags, Inc., with an authorized capital of 10,000 shares, of which 1,000 was to be common stock, without par value, to be issued for such consideration as the board of directors might deem advisable. The remaining 9,000 shares were to be preferred stock, of the par value of $100 per share, to be issued by the new corporation in extinguishment of 80 per cent of the proved and al-

lowed claims of the creditors and 20 per cent was to be paid by notes, to the creditors who proved their claims, the first series due on January 2, 1932, the second series due July 2, 1932, the third series due January 2, 1933, and the fourth series due July 2, 1933. These notes were non-interest-bearing and given without security.

At the time the bill was filed, Morris White, Inc., had about 245 creditors who were owed about $1,072,000.30. Among its creditors were the United States government for taxes, $80,000; New York state for taxes, $57,000; banks partly secured, $440,000; and merchandise creditors, $400,000. The assets which were appraised by a creditors' committee, on a going concern basis, were as follows: Merchandise inventories listed at $1,241,208.09; $5,000 in cash; $300,000 in accounts receivable; and $4,000 in listed securities. Of the $300,000 accounts receivable, approximately $250,000 was pledged as collateral for bank loans. The creditors' committee's appraisal of the merchandise inventoried was $717,000, on the basis of a going concern value, and $357,000 on a forced sale in liquidation. The leathers listed in the accountant's statement at $316,000 were appraised by the committee's appraisers at a value of $255,000 on a going concern basis, and $75,000 at a forced sale. Frames for hand bags, stated by the accountants to be $161,000, with a net worth of $80,000 on the basis of a going concern value, were appraised at $25,000 on a forced sale basis. Machinery and equipment, if sold at auction, would bring $10,000, whereas, if retained to carry on the business, would be worth $200,000. There was also an item of loans amounting to $1,700,000 to the Morris White Holding Company, a real estate corporation, owning three large hotels in the city of New York, upon each of which there were first mortgages. It was established in the court below that Morris White, Inc., consistently made profits averaging about $500,000 per year, which demonstrated a good will not valued.

The argument in support of the plan of reorganization is based upon the theory that the business in the past has been profitable and the best use of the assets could be made by continuing the business, that profits are realizable in the future, and that Mr. White's management would make it possible to rehabilitate the business and pay the creditors. For three years of his management, White was to be paid

not more than $60,000 per year as a salary, to be fixed by the board of directors. The common stock is allotted to White. The plan provides for five directors. The preferred stock is placed in the name of two voting trustees for a period of ten years, one of such trustees to be designated by a member of the creditors' committee representing the merchandise creditors, and the other to be designated by the members of the creditors' committee representing the bank creditors. Because of this, voting trust certificates were issued for 80 per cent of the indebtedness. It was provided that the voting trustees elect two directors, one from the banking creditors' committee, and one from the merchandise creditors' committee; otherwise the preferred stock was not to vote. The management of the corporation is left to the control of the common stockholders. The board of directors is given exclusive right to employ executives of the new corporation.

[fol. 253] The appellants object to the plan, complaining that the assets of the corporation are given back to Mr. White, the owner and manager of Morris White, Inc., without obligation to pay or repay except in redemption of preferred stock and the notes referred to. It is argued that the company failed because of his management of Morris White, Inc., that there is no new money advanced to carry on the business, nor have the creditors been offered cash in part or whole for the value of their claims. White might receive a salary of $60,000 a year. The banks, as secured creditors, have, in addition to their security, the preferred stock and notes just as unsecured creditors receive. Counsel for the creditors' committee is to receive an unnamed sum to be agreed upon between them and the new corporation. The indebtedness of $158,500 taxes due the federal and state governments is assumed by the new corporation.

The appellants are creditors as follows: National Surety Company, American Credit Indemnity Company, and London Guaranty & Accident Company, Limited, insured accounts owed by Morris White, Inc., and claims have been filed against them, some of which have been paid, in the sum of $92,138.15. At least one has been paid amounting to $19,329.42; Hermann Loewenstein is a creditor for $5,600, and G. Levor & Co., Inc., for $4,500. The plan of reorganization has the approval of the creditors' committee, representing claims amounting to $589,000 out of the total of

$1,072,000, as well as the tax creditors, the United States government, and New York state and the bank creditors. The court below, in approving the plan, said:

"I agree that the proposed reorganization is more or less of an attempt by Mr. White to lift himself by his bootstraps, in that there is here no capital with which to finance the new concern, save such as he thinks may be received on his business record from others who are favorably disposed toward him. All of us know, unfortunately too well, the present condition of business. Mr. White is hopeful; whether he is over-enthusiastic or not, I do not know; but certain it is, I think, that quite as much is to be anticipated from such effort as he might make to rehabilitate himself, as is to be had from liquidation. * * * If he can 'deliver the goods,' to use the vernacular, he should, of course, be well paid for his services; and it would be most gratifying, I am sure to everyone, if, at the end of the summer he could carry out his expressed hope of giving his creditors a check for the 20 per cent. I trust that he may be able to do so."

And, in approving the offer, the court modified the plan so as to make dividends on preferred stock cumulative, to make fees allowed subject to the approval of the court, and ordered that Mr. White file a stipulation to the effect that for three years he will render exclusive services and will not, in any way, engage in any competing business.

The transfer of the property for this offer was without public sale, and competitive bids were not sought or submitted. The order in this modified form, and under these circumstances, for the transfer of the property pursuant to the plan of reorganization, was opposed by the appellants.

The question presented to us is whether these minority creditors are obliged to accept the plan, taking stock and notes in place of cash, and be contented to wait the outcome of this new venture in the hope that some day the preferred stock will be redeemed and payment of their notes made. Have the appellants been deprived of their rights as creditors by this order?

Assets of an insolvent commercial corporation have long been recognized as a trust fund for the payment of its creditors. It has likewise long been recognized that contract obligations may not be impaired by the courts. Muhlker v. N. Y. & Harlem R. R., 197 U. S. 544, 25 S. Ct. 522, 49 L. Ed.

872. Private property may not be taken in violation of contract obligations. A creditor may not be compelled to accept, in payment of his claim against a private corporation, paper which is not legal tender of the United States (Constitution of the United States, art. 1, § 10). Any other tender is not a valid tender. Farmers' & Merchants' Bank v. Federal Reserve Bank, 262 U. S. 649, 43 S. Ct. 651, 67 L. Ed. 1157, 30 A. L. R. 635. If the order appealed from does not pay the debts of the corporation to the extent of its financial ability to pay, it wipes out the contract obligations by which credit was extended to the corporation. The court has not the power to direct a creditor to accept stocks of a private corporation in payment of its commercial obligation. The assets of the corporation may not be used as a fund for the benefit of the debtor rather than a creditor. Commercial [fol. 254] obligations, such as an extension of credit, must be imposed by the contracts of the parties with the legal obligations flowing therefrom. It must be left to the decision of the creditor whether he will accept a new form of security in payment of his debt, and thus embark upon a new venture, or insist upon the rights which are his because of the contract which he entered into and by which he extended credit. These principles are supported by judicial decision. In Northern Pacific Ry. v. Boyd, 228 U. S. 482, 33 S. Ct. 554, 561, 57 L. Ed. 931, Boyd obtained a judgment against the railroad. While it remained unsatisfied, a reorganization plan was executed by which the Northern Pacific Company, at foreclosure sale, purchased a debtor railroad. The reorganization contract between the stockholders and bondholders of the old company made no provision for Boyd and he claimed that he had no notice that the stockholders were to retain an interest in the new company. The Circuit Court of Appeals (177 F. 804) affirmed the decree subjecting the property of the Northern Pacific Company to the payment of his judgment. The Supreme Court, holding that the creditors were entitled to be paid before the stockholders could retain the property for any purpose whatever, said:

"This conclusion does not, as claimed, require the impossible, and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds

or preferred stock. If he declines a fair offer, he is left to protect himself as any other creditor of a judgment debtor; and, having refused to come into a just reorganization, could not thereafter be heard in a court of equity to attack it."

But the court pointed out that, if no tender was made to him to come in as a creditor, his rights against the property in the new company subjected it to full payment of the debt.

In Kansas City Ry. Co. v. Central Union Co., 271 U. S. 445, 46 S. Ct. 549, 551, 70 L. Ed. 1028, which involved the sale of railroad property under the foreclosure of a mortgage, the court referring to the rule that, where it was necessary in order to protect all interest for stockholders and bondholders to enter into an agreement, any arrangement made must be executed so as not to secure the subordinate rights of stockholders at the expense of prior rights of creditors, said:

"This doctrine is the 'fixed principle' according to which Northern Pacific Ry. Co. v. Boyd, 228 U. S. 507, 33 S. Ct. 554, 57 L. Ed. 931, declares the character of reorganization agreements must be determined, and to it there should be rigid adherence. But, as that opinion states, this does not require the impossible, and make it necessary always to pay unsecured creditors in cash before stockholders may retain any interest whatever in the reorganized company. By way of illustration it further pointed out, that such creditors can be protected 'by the issuance, on equitable terms, of income bonds or preferred stock.' And we now add that, when necessary, they may be protected through other arrangements which distinctly recognize their equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation, and afford each of them fair opportunity, measured by the existing circumstances, to avail himself of this right."

In Temmer v. Denver Tramway Co., 18 F. (2d) 226 (C. C. A. 8), judgment creditors appealed from a decree fixing the manner and amount of their participation in the reorganization plan. The creditors were to receive preferred stock of the new company to the extent of their claims allowed. The stockholders and bondholders of the old company were given new bonds and stock in the reorganized company. The creditors contended that the distribution was

unfair and that they were entitled to be paid in cash out of a fund which the receiver had accumulated because he had been ordered by the court to refrain from paying interest on the old bonds. This fund went to the new company for working capital. All but 3 per cent of the bondholders, 3 per cent of the stockholders, and 30 per cent of the unsecured creditors approved the plan. The court approved the plan, as well as the provisions for unsecurred creditors, and said that the creditors were given dollar for dollar in preferred stock of the new company. The stockholders received new stock, paying $10 per share in addition to surrendering each share of old stock. It was held that the creditors need not be paid in cash before the stockholders could retain an interest in the new company. New funds were necessary in the plan, and it was impossible to obtain them unless stockholders were permitted to come in with their contribution. The funds [fol. 255] out of which the creditors claimed payment belonged to the old bondholders, as accrued interest, and it was held they could use it as they saw fit in the plan of reorganization. Merchants' L. & T. Co. v. Chicago Rys. Co. (C. C. A.) 158 F. 923; Phipps v. Chicago, R. I. & P. Ry. Co. (C. C. A.) 284 F. 945, 28 A. L. R. 1184.

But the instant case does not involve the powers of a judge sitting in equity merely to pass on the fairness of a plan of reorganization in a case where there has been a public sale or other provisions for payment to creditors who object to the plan of the liquidation of the fair value of their claims in cash. In reorganizations, the courts have refused approval of plans of reorganization where cash payment is not offered. Geddes v. Anaconda Mining Co., 254 U. S. 590, 41 S. Ct. 209, 65 L. Ed. 425; In re Northampton Portland Cement Co. (D. C.) 185 F. 542; In re Sale of Assets of First Natl. Bank of Florence (D. C.) 6 F. (2d) 905; In re J. B. & J. M. Cornell Co. (D. C.) 186 F. 859; In re J. B. & J. M. Cornell (D. C.) 201 F. 381; In re Prudential Outfitting Co. (D. C.) 250 F. 504. In such cases, the courts should not require the creditor in a reorganization plan to accept, over his objections, stocks or notes in lieu of his claim for cash, even though there may be prospects of payment from the new and willing debtor. Harding v. Amer. Tobacco Co. (D. C.) 14 F. (2d) 168.

The compelling motive in an equity receivership is to save the business. Where a corporation is faced with financial

difficulties, which seem but temporary, and require careful handling with promise of success in reorganization, it has long been the practice of a court of equity to lend a helping hand, having in mind that at the end of the receivership there shall be a reconstructed and saved business. But such good motive may not deprive a creditor of the rights created under the direct obligation resulting in the indebtedness. As Justice Brewer said in Merchants' Loan & Trust Co. v. Chicago Rys. Co. (C. C. A.) 158 F. 923, 927: "A party insisting upon those rights is probably, or even certainly, bound to suffer loss, yet while he insists it [the court] must protect him in his insistence. There is no wide discretion vested in the chancellor which permits him to disturb contract rights—rights of property." Kneeland v. American Loan Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. Ed. 379; Gay v. Hudson Elec. Co. (C. C. A.) 184 F. 689; Odell v. Batterman (C. C. A.) 223 F. 292.

In Habirshaw Elec. Co. v. Habirshaw Elec. Co., Inc. (C. C. A.) 296 F. 875, 43 A. L. R. 1035, the court merely held that, where a creditor deposits his claim with a reorganization committee, such deposit constitutes a binding contract, and a creditor may not withdraw his claim except in accordance with his contract obligations.

It is well established that, where a court of equity takes into its possession the assets of an insolvent corporation, it will administer them on the theory that they belong to the creditors and shareholders rather than to the corporation itself. U. S. v. Butterworth Corp., 269 U. S. 504, 46 S. Ct. 179, 70 L. Ed. 380. We are unable to find authority for the claim of the appellees that the court has power to compel a creditor of any kind to accept stocks or promises to pay in the future in full extinguishment of his claim, without being afforded the alternative of receiving his proportionate share of the proceeds of the conventional sale of the property in cash.

There was no public sale and therefore no competitive bidding. Apparently what took place below was that an offer was made by Mrs. White for all the assets. The creditors' rights thereto were wiped out. They were directed to take preferred stock and notes. By the acceptance of the offer, the new corporation obtained the assets of the old Morris White, Inc. No new money or other assets were pro-

vided. If the transaction be termed a sale, it was not a public sale. It was a private sale approved by the court. Moreover, the reorganization plan and the method of carrying it out deprived the appellants of the opportunity which might have been afforded to them of questioning the assignment of accounts which were given as collateral to the banks. The appellants should have full opportunity to question any preference that may have been made. The banks should not collect on the security which has been pledged as collateral, and, in addition thereto, receive preferred stock. They may agree to accept preferred stock and notes for such sums as they do not realize upon the sale of the collateral up to the amount of their respective claims, but no more. One of the evils of this reorganization plan may be the retention of this collateral by the bank creditors in [fol. 256] disregard of the rights of unsecured creditors to share in the assets of the corporation.

An outstanding circumstance is the willingness of the majority of creditors to proceed with this reorganization, expressing the view, as they did in the court below, that the rehabilitation of White's business gave the best promise for the payment of their debts. They willingly consented to the transfer of all the corporation's assets, deferring the payment of their debts for a sufficiently long time to warrant the expectation of payment of the notes and redemption of the preferred stock. But the minority creditors, appellants, insisting upon the right to share immediately in the proceeds of a forced sale of the corporation's assets, have dissented. Their rights must be protected. They are ordinarily entitled to a public sale with competitive bidding, the assets to be sold to the highest bidder. They have a just claim to their proportionate share of the price which would have been realized at such sale after deduction of administration expenses. If a court of equity can protect these rights and at the same time carry out the wish of the other creditors who favor the plan of reorganization, it should be done. The reorganization plan has been put into operation, and creditors, excepting the appellants, are content to have it proceed. We think both may be protected.

The appellants will be fully protected by having an appraisal of the value of their respective claims made before a master, to be appointed, who will take an account of the

assets and liabilities of Morris White, Inc., ascertaining the value of the assets as if sold at a public sale. If the appellants establish that preferences have been granted by pledging as collateral the accounts to the banks, these preferences should be regarded as invalid for the purpose of the calculations and the amount of the accounts so pledged considered as part of the assets. In this way, from the ascertained sum of money that would have been realized, had a sale taken place, the appellants may be awarded their aliquot shares of the assets. This sum must be paid in cash, or, at the option of each of the appellants, the preferred stock and notes offered to them may be valued as of the date the reorganization plan became effective, and that sum paid in cash to them or either of them. Geddes v. Anaconda Co., 254 U. S. 590, 41 S. Ct. 209, 65 L. Ed. 425; Jones v. Missouri-Edison El. Co. (C. C. A.) 203 F. 945. Thus the appellants will be placed in a position of having awarded them what would be the result if a distribution of the proceeds of a sale of the assets of the corporation had been made. If payment is not thus made in cash, the several amounts which appellants are found entitled to may be collected by a sale of the property transferred to the new corporation. This enables the minority creditors, in a practical manner, to obtain cash in payment, or part payment of their indebtedness. It will afford co-operation with the majority in carrying out the plan of reorganization. Kansas City Ry. v. Central Co., 271 U. S. 445, 46 S. Ct. 549, 70 L. Ed. 1028. There will thus be preserved to appellants their right to payment in cash, and it removes the objection they properly raise. The remaining creditors, satisfied with the plan, are then free to proceed with its operation.

With this disposition, the order of June 3, 1931, making the receivership permanent, will be affirmed, and the order of June 15, 1931, will be reversed with directions to the District Court to enter an order in conformity with this opinion.

The costs of this appeal including the printing of both records, may be taxed against the appellees.

[fols. 257 & 258] Clerk's Certificate to foregoing omitted in printing.

[fol. 259] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

DECREE—Nov. 23, 1931

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, reversed, with costs and cause remanded to the District Court for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 260] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1931

No. 727

NATIONAL SURETY COMPANY et al., Petitioners,

vs.

VALERIA E. CORIELL, MORRIS WHITE, INC., et al.

ORDER ALLOWING CERTIORARI—Filed May 16, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. [redacted] 8

NATIONAL SURETY COMPANY, et al.,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

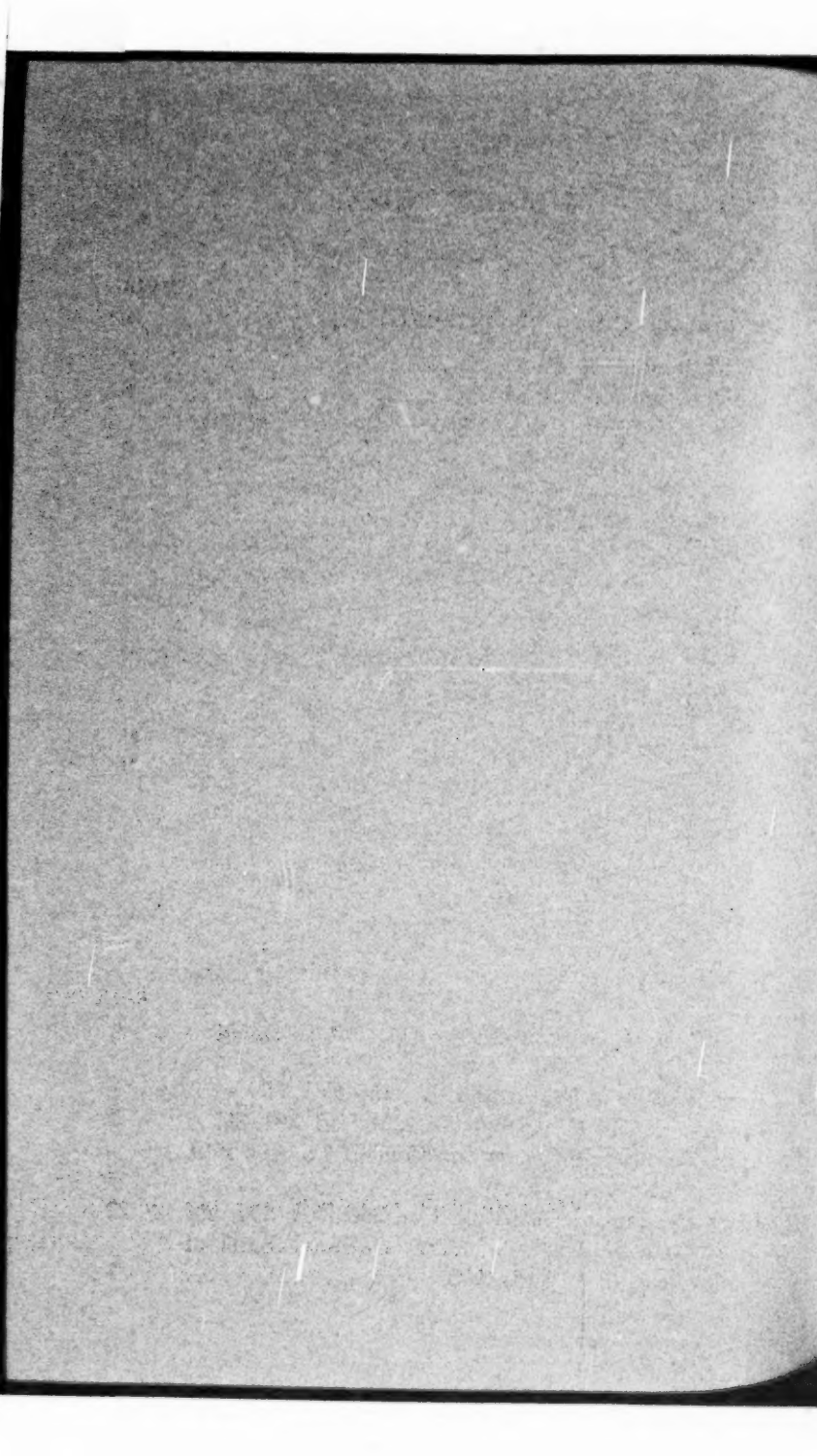
MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, et al.,
constituting a Committee of Creditors of Morris White, Inc.,
Respondent (Appellee Below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHARLES H. TUTTLE,
SELDEN BACON,
SAUL S. MYERS,
Counsel for Petitioners.



SUBJECT INDEX.

	PAGE
Petition for a Writ of Certiorari	1
Statement of Facts	2
Questions Involved	6
Reasons Relied on for the Allowance of the Writ	6
Importance and Novelty of the Questions	7
Prayer for Writ	9
Brief in Support of Petition for a Writ of Certiorari	11
The Opinions of the Courts Below	11
Jurisdiction	11
Statement of Facts	11
Specifications of Error	15
Argument	15

Table of Cases Cited.

Coriell *vs.* White, 54 F. (2d) 255	5, 11
Gay *vs.* Hudson River Electric Power Co., 184 Fed. 689, 693-4	7
Geddes *vs.* Anaconda Mining Co., 254 U. S. 590	8
In re J. B. & J. M. Cornell Co., 186 Fed. 859	7
In re J. B. & J. M. Cornell Co., 201 Fed. 381, 387	7
In re Northampton Portland Cement Co., 185 Fed. 542, 543	7
In re Prudential Outfitting Co., 250 Fed. 504, 506	7, 20
In re Sale of Assets of First National Bank of Florence, 6 F. (2d) 905	7

PAGE

Jones *vs.* Missouri Edison El. Co., 203 Fed. 945.. 8

Kansas City Ry. *vs.* Central Co., 271 U. S. 445... 8
Kneeland *vs.* American Loan Co., 136 U. S. 89, 97. 7

Merchants Loan & Trust Co. *vs.* Chicago Rwys. Co., 158 Fed. 923..... 7

Northern Pacific Ry. *vs.* Boyd, 228 U. S. 842..... 8, 14

Odell *vs.* Batterman Co., 223 Fed. 292, 297, 299... 7

Pomeroy's Equity Jurisprudence (4th Ed.), Vol. 1, Sec. 47, p. 51 7

TABLE OF STATUTES.

U. S. Judicial Code, Sec. 240-A..... 11

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

No.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below)

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below)

MORRIS WHITE, INC.,
Respondent (Appellee Below)

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent (Appellee Below)

MICHAEL HOLLANDER, *et al.*, constituting a Committee of Creditors of Morris White, Inc.,
Respondent (Appellee Below)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE CHARLES E. HUGHES, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co., Inc., the

above-named petitioners, respectfully pray that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit entered on November 25, 1931, purporting to reverse (but actually only modifying) the decree of the United States District Court for the Southern District of New York, dated June 15, 1931, and made by Judge Knox, authorizing the Irving Trust Company, as receiver of the property of the defendant Morris White, Inc., to accept an offer of Lily White for all the property of that corporation.

Simultaneously herewith, petitioners are presenting to this Court a petition for writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Second Circuit, also entered on November 25, 1931, affirming the decree of the United States District Court for the Southern District of New York, dated June 3, 1931, and made by Judge Knox, making the Irving Trust Company permanent receiver of the defendant Morris White, Inc.

Statement.

On April 6, 1931, Valeria E. Coriell, one of the respondents, as assignee of New Jersey National Bank & Trust Company, the holder of the demand note of Morris White, Inc. for $27,900, filed a bill of complaint in equity against Morris White, Inc., one of the respondents, alleging that although Morris White, Inc. was then solvent, its accrued liabilities were in excess of its quick assets and requested the appointment of a receiver because Morris White, Inc. was then and for some time in the future would be unable to meet its matured and maturing obligations. Morris White, Inc., whose business was the manufacturing and selling of ladies' handbags and other fancy leather goods, filed its answer admitting the allegations of the bill of complaint and consented to the appointment of a receiver (fol. 32).

Valeria E. Coriell is a simple contract creditor. She has obtained no judgment. She does not profess to hold any collateral security. Morris White, Inc. is simply Morris White (fol. 542).

By decree of June 3, 1931, the receivership was made permanent (fol. 631) and thereafter by decree dated June 15, 1931, the court approved an offer submitted by Lily White, wife of Morris White, the president of Morris White, Inc., for the "purchase" of the assets of Morris White, Inc. The offer contemplated the formation of a new corporation to be known as Morris White Handbags Corporation, with a capital of 10,000 shares consisting of 1,000 of no par common and 9,000 preferred of the par value of $100 per share. The common stock had the voting power. It was to be issued at the pleasure of the directors and was to go to Morris White who had the appointment of a majority of the board of directors. The preferred stock was to be used in extinguishment of 80% of the creditors' claims (fols. 101-107). The remaining 20% of the claims was to be "paid" in non-interest bearing, unendorsed and unsecured promissory notes of the new corporation (fols. 128, 129).

No new capital, in money or assets, was provided (fol. 244). No cash was paid (fol. 244). No security was given or tendered. No public sale,—not even an actual private sale—took place. Actually, all that happened was (to quote the words of Judge Knox) "a taking" by the insolvent White of "all the assets of the creditors and wiping them out, with the exception of 20% of their claims and subjecting them to the hazards of the (new) enterprise",—a result whereby he "got the capital of the creditors there for years at his disposal" (fols. 432-3, 404).

At the time when the offer was made, Morris White, Inc. was insolvent within the meaning of the Bank-

ruptcy Act. The cash on hand on April 6, 1931, when the bill of complaint was filed and the temporary receiver was appointed, was only $5,600, whereas the total liabilities were $1,072,000 (Rec., pp. 198, 199).

The receiver's counsel estimated "the total asset position" of the transferee company (Morris White Handbags Corporation) as only $583,500 without taking into consideration the estimated administration expenses of $50,000 or the unfixed fee of the counsel of the so-called Creditors' Committee or the priority liens of the Federal and State Governments for $158,000, and "without taking any cognizance of the miscellaneous frozen assets, intercorporate claims" which obviously were of merely problematic worth (fol. 453).

A preferential payment of over $25,000 had to be made to a judgment-creditor (fols. 175-8, 186-229).

The defendant corporation had "not a dollar" of orders on hand and the market was constantly falling (fols. 248, 457-8).

Nearly $2,000,000 of the company's assets had been diverted by White to a personal venture which had become bankrupt (fols. 540-2, 411, 359). White himself was bankrupt (fols. 393-4).

In other words, the actual picture was one of insolvency, presenting a typical case for the Bankruptcy Act and for the rigid investigation under Section 21-A.

In keeping with this picture, no rehabilitation of the debtor corporation was possible or was attempted. The opposite course was taken. Eighty per cent of its indebtedness to its creditors was wiped out by mere fiat of the court; the remaining twenty per cent was transferred to and assumed by another corporation which had no assets of its own and which received no new capital from any source. Morris White, Inc., instead of being revived, was killed.

The petitioners, whose claims aggregate over $120,000 (fols. 279, 280, 600-608), opposed the approval of the

offer and claimed that by reason of the defendant's bankruptcy, the court should relinquish jurisdiction of the defendant in equity and allow the defendant and its creditors to pursue their rights and remedies in bankruptcy (fols. 258, 263-5, 273-4, 294-5, 606-7).

The Circuit Court of Appeals unanimously "reversed" the order of the District Court with an opinion per Manton, C. J., 54 F. (2d) 255. The fundamental propositions of this opinion were:

> 1. There was no power in the District Court to compel any contract creditor to accept, in extinguishment of his claim, the preferred stock and unsecured obligations of a new industrial corporation, without the payment of any cash.
>
> 2. The petitioners were entitled to receive their proportionate share of the proceeds of a conventional sale of the property in cash.
>
> 3. The rights of petitioners can be satisfied by giving them in cash, in lieu of a sale, an aliquot share of what would have been realized if the property of Morris White, Inc. had been sold at public auction, or, at their option, by giving them in cash an aliquot share of the value of the preferred stock and notes offered to them by the so-called reorganization plan and as of its date.

The opinion of the Circuit Court of Appeals concludes:

> "Thus the appellants will be placed in a position of having awarded to them what would be the result if a distribution of the proceeds of a sale of the assets of the corporation had been made. If payment is not thus made in cash, the several amounts which appellants are found entitled to may be collected by a sale of the property transferred to the new corporation. This enables the minority creditors, in a practical manner, to obtain cash in payment, or part payment of their indebtedness."

The Questions Presented.

1. Did the Circuit Court of Appeals rightly decide that the petitioners' right was merely to an aliquot share in cash of such sum as a Special Master may find would have been realized if the property of Morris White, Inc. had been sold at public sale on June 15, 1931?

2. Or should the Circuit Court of Appeals have reversed entirely the decree of the District Court dated June 15, 1931, and have directed that the property of the defendant be sold?

3. Did the Circuit Court of Appeals rightly decide that the rights of these petitioners could be fully protected by relegating them, months after the actual transfer had occurred, to a mere guess of a Special Master as to what might have been realized at a public sale six or more months previously, which sale was never held and the terms and methods of which were never determined?

4. If the Circuit Court of Appeals was otherwise right, did it rightly limit the security of the petitioners for the payment of their aliquot share in cash to what might be collected by a sale of the property of Morris White, Inc. transferred to the new corporation, notwithstanding that in the interval much of that property would inevitably be consumed in the new corporation's business before such a sale could be made?

Reasons Relied On for the Allowance of the Writ.

A.

The Circuit Court of Appeals erred in holding that these petitioners merely had a right to an aliquot share in cash of whatever sum the Special Master might find as the realizable value of the property of Morris White,

Inc. at public sale as of June 15, 1931, or, at their option, an aliquot share in cash of whatever sum the Special Master might find to be the value of the preferred stock and notes offered to them under the so-called reorganization plan.

In re Prudential Outfitting Co., 250 Fed. 504, 506;
In re J. B. & J. M. Cornell Co., 186 Fed. 859;
In re J. B. & J. M. Cornell Co., 201 Fed. 381, 387;
In re Northampton Portland Cement Co., 185 Fed. 542, 543;
In re Sale of Assets of First National Bank of Florence, 6 Fed. (2d) 905;
Merchants Loan & Trust Co. v. *Chicago Rwys. Co.*, 158 Fed. 923;
Kneeland v. *American Loan Co.*, 136 U. S. 89, 97;
Gay v. *Hudson River Electric Power Co.*, 184 Fed. 689, 693-4;
Odell v. *Batterman Co.*, 223 Fed. 292, 297, 299;
Pomeroy's Equity Jurisprudence (4th ed.), Vol. 1, Sec. 47, p. 51.

B.

The Circuit Court of Appeals erred in holding that petitioners would have adequate security for payment by decreeing that the sum awarded them might be collected "by a sale of the property transferred to the new corporation", notwithstanding that in the interval much of that property would inevitably be consumed in the new corporation's business before such a sale could be made.

Importance and Novelty of the Questions.

The decision of the Circuit Court of Appeals is without precedent. Nevertheless it will have wide applica-

tion, particularly in these times of economic stress where so many corporations are passing into the hands of receivers.

The rule that the rights of dissenting creditors may be determined by a mere guess by a Special Master at what might have resulted if different action had been taken six months ago under circumstances and possibilities now unknown and unknowable, is an entirely novel proposition.

Neither *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590; nor *Jones* v. *Missouri Edison El. Co.*, 203 Fed. 945; nor *Kansas City Ry.* v. *Central Co.*, 271 U. S. 445, is authority in any way for the decision of the Circuit Court of Appeals.

As to cases involving reorganizations of public utilities companies, it cannot be too strongly stressed that the rule there applicable is not applicable to private industrial corporations exercising no public franchises and performing no public service the continuance of which is a public necessity. But even in cases of public service corporations the courts have never heretofore relegated non-assenting creditors to uncertainties and to questions unsusceptible of proof. Even in *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482, Boyd was given direct and positive relief.

The present case, taken together with the accompanying petition for a review of the decree of June 3, 1931, places before this Court for the first time the whole subject of the rights and remedies of non-assenting creditors in connection with a reorganization plan of a purely private industrial corporation.

We respectfully submit that it is of public importance that in the instance of such corporations—and the instances are bound to increase—the limitations of the legal and discretionary powers of a court of equity in this class of subject-matter, should be authoritatively and finally defined.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

NATIONAL SURETY COMPANY
AMERICAN CREDIT INDEMNITY COMPANY
LONDON GUARANTY & ACCIDENT COMPANY, LTD.
HERMANN LOEWENSTEIN
G. LEVOR & CO., INC.

CHARLES H. TUTTLE,
SELDEN BACON,
SAUL S. MYERS,
of Counsel.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 54 F. (2d) 255. Judge Knox rendered no formal opinion.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit on November 25, 1931.

Jurisdiction to issue the writ is found in the provisions of Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

Statement of Facts.

The principal facts are stated in the foregoing petition.

The following supplemental statement is now made.

Morris White himself asserts that "Morris White, Inc. is Morris White" (fol. 542). He is a director and stockholder in the Bank of United States, with all the possibilities destructive of financial credit which that double relationship implies (fol. 532).

He admitted that he personally owed Morris White, Inc. $137,729.68, representing money taken by him from it and employed in his other ventures, particularly in the Morris White Holding Company which he used in his real estate speculations and of which he is the sole stockholder (fols. 538-9, 542). That company also is in bank-

ruptcy (fol. 359). It is also indebted to Morris White, Inc., for $1,700,000 representing additional moneys diverted by White from Morris White, Inc. to the Morris White Holding Company. There is no security for either of these debts (fol. 539).

In other words the insolvency of Morris White, Inc. is due solely to the fact that Morris White for his personal ends took from it and lost nearly $2,000,000 constituting part of the trust fund for its creditors. Yet, below, that conduct was not only not condemned but was actually rewarded by what is nearly tantamount to a gift of the remainder of the trust fund (fols. 582, 307) **and a proposed salary from the new corporation of $60,000 a year** (fols. 509, 510).

The "reorganization plan", approved by the District Court and continued by the Circuit Court of Appeals except as against these petitioners, had in it for White and certain favored creditors a number of advantages which, in the vernacular, are commonly called "jokers". Some of them are as follows:

1. The (secured) creditors are enabled, notwithstanding their security, to receive notes for 20% of their entire claims.

2. Notwithstanding the opening euphemisms of the White offer (fols. 103-5), the end of the offer discloses that *the creditors do not really get any preferred stock at all* but only voting trust certificates in a voting trust to last for ten years and to be composed of two creditors in whose selection the creditors generally have no voice whatever (fols. 140-3).

3. Of the five directors Morris White is to designate three, and the voting trustees two (fol. 110).

4. While the promissory notes are still outstanding, White may fix the salaries of himself and his associates at any figure he may please, provided he can secure the support of one of the directors in addition to the three controlled by himself (fols. 111-2).

5. He stated that he expected for himself a salary of $60,000 a year (fols. 509, 510).

6. The new company is under no obligation to pay dividends on the preferred stock until January 1, 1934 (fol. 114).

7. White keeps indefinite control of the capital of the creditors, and if the profits never exceed the executive salaries he is endowed for life.

8. Even the provision for the redemption of the preferred stock works in White's favor, because he is obliged to apply in redemption only "one-third of the said earned net operating profits of the said corporation for said fiscal year" (fols. 116-7). In other words out of every $3 which the new corporation earns with the creditors' capital, he can keep $2 in reserve for his common stock and return only $1 to his creditors.

9. To White, who controls a majority of the board of directors is expressly reserved the power, without consulting the preferred stock, to mortgage or sell the property of the new corporation or bring about its voluntary dissolution (fols. 104-6).

10. In conjunction with the voting trustees he can even cause the new corporation to guarantee the bonds or obligations of any other corporation (fols. 104-6).

11. To the two voting trustees is reserved the right to increase the preferred stock or create any other class of preferred stock (fol. 107).

12. The provisions for fees contains no limitations, and the fee to the attorney of the so-called Creditors' Committee is left entirely to himself and to the new corporation, to wit, to himself and White (fols. 125, 128).

13. White is not required to give any security for performance on his part, and is under no obligation to return any portion of the creditors' capital over and above the 20%.

14. White is under no pledge to procure new money. He runs the new corporation at the risk of the creditors of the old corporation and on the money obtained from them for forced levy.

15. Behind the carefully constructed screen of the White offer, the fact is discernible that the creditors, either individually or as a class, have no voice at all in the control of the new corporation.

16. The White offer, at every point, gives no advantage to the sole stockholder of the old corporation (to wit, White) over its creditors,—directly contrary to the "first principle" announced in the *Boyd* case, 228 U. S. 482.

The judicial acceptance of this offer did not constitute a public sale,—or even a private sale in any true sense of the term.

Neither White nor the new corporation (Morris White Handbags Corporation) paid anything at all either to the corporation or to the creditors. No security even was given. No new money or new assets were provided (fol. 244). On the contrary, *it was the creditors who*

paid. They paid by the surrender (compelled by the Court) of 80% of all their claims.

On the second day of the hearings (May 27th), the Receiver's counsel presented a condensed statement of assets and liabilities, prepared by accountants as a summary of the books as of April 6th, the day this action was commenced (fols. 288, 289; Rec., p. 198). But no one claimed that this statement of book amounts had any relation whatever to reality,—indeed, everyone conceded that it did not (fols. 452-4).

Specifications of Error.

1. The Circuit Court of Appeals erred in not directing that Morris White, Inc. be liquidated on the bankruptcy side of the court.

2. The Circuit Court of Appeals erred in not entirely reversing the decree of the District Court dated June 15, 1931, instead of deciding that the petitioners' right was merely to an aliquot share in cash of such sum as a Special Master may find would have been realized *if the property of Morris White, Inc. had been sold at public auction* on June 15, 1931.

ARGUMENT.

I.

The power exercised by the Circuit Court of Appeals is without precedent. It is the first decision of its kind.

Until this instance, it had always been assumed, in the case of private commercial corporations, that no so-called reorganization by which the corporation is stripped

of all its assets could be effected without the consent of all creditors unless a conventional sale or its equivalent occurred. The usual practice has been for the reorganization committee to get into its possession as many claims as possible and then to bid upon the public sale, applying against the purchase price the amounts realized on the claims so held.

But by the decision of the Circuit Court of Appeals this time honored procedure is scrapped. Under that decision, a group of the creditors may, through a court of equity, do what they could not possibly do under the Bankruptcy Act nor under the equity practice as it has heretofore been understood, to wit: dispense altogether with any sale, public or private, cause the assets to be transferred to a new corporation organized by themselves without new capital, money or assets; and, without making any payment, throw upon the other creditors the duty and expense of employing lawyers and accountants in undertaking to make impossible proof, namely, the amount which the assets would have realized if sold at a theoretical public sale held six months previously under terms of sale which had never been fixed, with a manner of advertising now undeterminable, and with circumstances of bidding now unknowable.

The burden and expense thus thrust upon minority creditors is practically prohibitive. Even if they undertake it, the proposition which they are required to establish can, at best, be a mere guess and undeterminable by any practical standards,—a proposition moreover, as to which they will almost certainly be overwhelmed by a flood of interested or inspired testimony (entirely safe and easy) from the officers and favored creditors to the effect that a public sale would have yielded little or nothing.

In consequence, for all practical purposes, the decision of the Circuit Court of Appeals comes to the same thing

as the decision of the District Court, which decision compelled the dissenting creditors to take stock and notes without any cash.

Why should those who desire to go on with the business be entitled to place this burdensome penalty and this incalculable risk upon those who do not desire to have their capital compulsorily confiscated (without payment) for a new corporation and a new hazard over which they have no control? Why should they be permitted to deprive non-assenting creditors of that actual demonstration and proof which the conventional sale affords?

If a group of creditors desires to transfer all the assets of a purely private enterprise to a new corporation, why should they not be required to buy in the usual manner and at public sale and thus provide the capital for and take the risk of their own speculation, without the right of extorting a compulsory contribution from others or putting others to the burden, expense and delay of an impossible solution of an abstract conundrum? If such a result cannot be accomplished out of court, by what magic, in case of a purely private enterprise, can it be accomplished in court?

Dispensing with a public sale was in no sense a necessity for the assenting creditors in the present case and cannot be a necessity in any case. They were entirely free to organize their own corporation and to bid at the sale. If the property sells for little or nothing, they are advantaged. If it sells for a great deal, the non-assenting creditors are the more protected in their enjoyment of their contract rights. In either event, the law has proceeded with certainty, in accordance with the best evidence, and with fairness to all.

Dispensing with a public sale, as was done in this case, enables the assenting creditors to nullify the constitutional rights of the non-assenting creditors, to avoid the actual test which a conventional sale provides, to

deny to the non-assenting creditors the protection of public advertisement with proper inventories and appraisals, and to throw upon them an expense and a hazard which, while doing lip-service to the letter of their rights, destroys their substance and denies their spirit.

Such a result and such a precedent are, we submit, contrary to public policy. It puts the enjoyment and protection of rights not on the solid basis of reality but upon the quicksands of guesswork and speculation. It impairs, by indirection, the obligation of contracts. It enables a group of interested creditors to confiscate the capital and property rights of those who disagree with them and to substitute in exchange a paper interest in a pure hazard.

The difference between the decision of the Court of Appeals and the decision of the District Court is theoretically large but practically none at all. The difficulties to which the former subjects the non-assenting creditors is substantially equivalent to the exclusion which the latter imposed.

II.

But there are further considerations of law and policy.

How can any Special Master ascertain "the value of the assets as if sold at public sale" under conditions which have long since passed and which cannot be reconstructed?

In the present case, there was at no time either an inventory, or a verified and adequate accountants' statement, or an appraisal. The failure of the District Court to require such protective proofs before proceeding to authorize the transfer, was one of the non-assenting creditors' chief complaints (fols. 275, 293-7, 299, 476-7, 500-1, 514-7, 520-3, 543-7). Nor did the Circuit Court of Appeals have before it either inventory, verified accountants' statement or appraisal.

Why should the creditors, who properly opposed their compulsory inclusion in the paper reorganization, be now left without practical relief because of the erroneous ruling, now reversed, by which they were prejudiced?

In the interval of time since June 15, 1931, the new corporation undoubtedly consumed or sold much of the merchandise transferred to it by the decree of that date. How can an inventory of the property then transferred now be prepared? How can it now be told precisely what property was available for sale on that date? How can these petitioners, who had no connection with the business at that time, now meet the self-interested testimony which would be offered by White and the assenting group as to the identity, nature and value of the property then on hand?

Moreover, is the Special Master to determine the value of each asset at cost less depreciation? Is he to take as the standard the market value? Is he to consider what would be paid by a going business or by a junk dealer? How is he to determine how many bidders would come forward in response to advertisement, the extent and manner of which cannot now be known? How is he to know how much the sale would have been enhanced by a proper inventory, appraisal and adequate accountants' statement which actually never existed? How could he know what would have influenced the bidders, or how good, bad or indifferent their competition would have been?

Furthermore, the decision of the Circuit Court of Appeals has the effect of attempting to measure payment to these petitioners by the most disadvantageous method of a theoretical *ex post facto* sale. At the time the District Court made its order the property might have been offered at public or private sale, in separate items or as a going concern; and comparison might have been made of the results with the White offer. But under the decision of the Circuit Court of Appeals the measure is the theo-

retical price which may now be deemed to have been procurable at the auction block without ever being able to know the results of the incentives, or the comparison of terms, which could have been ascertained by the District Court.

What the fair value of the property was on June 15, 1931 would (if there had been a proper inventory) be susceptible of proof; but what it would then have realized at a public sale is not now susceptible of proof. The consequences should fall, not upon those who stood upon their just rights, but upon those who illegally created the situation.

In re Prudential Outfitting Co., 250 Fed. 504, 506, and cases cited in the petition for certiorari.

III.

For the foregoing reasons an authoritative settlement by this Court of the questions and principles involved is urgent.

The direction of the Circuit Court of Appeals is entirely new in character. It substitutes guesswork for proof. It opens the door for all sorts of new abuses of a method of procedure already too much abused. It permits by indirection the very thing which, when directly done, it condemns. It impairs the obligation of contracts, confiscates vested rights, and usurps a power not resident in any court, whether of equity or otherwise.

Respectfully submitted,

CHARLES H. TUTTLE,
SELDEN BACON,
SAUL S. MYERS,
Of Counsel.

FILE COPY

Office Supreme
Ct. U.
APR 2
CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

Nos. [redacted] 8

NATIONAL SURETY COMPANY, *et al.*,
Petitioners
(Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent
(Appellee Below),

MORRIS WHITE, INC.,
Respondent
(Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent
(Appellee Below),

MICHAEL HOLLANDER, *et al.*, Constituting a Committee of Creditors of Morris White, Inc.,
Respondents
(Appellees Below).

PETITIONERS' REPLY BRIEF

GREGORY HANKIN
(of Washington, D. C.)
CHARLES H. TUTTLE
(of New York, N. Y.)
SAUL S. MYERS
(of New York, N. Y.)

INDEX.

PAGE

Petitioners' Reply Brief 1

I. **No. 726.** Order Making Receivership Permanent 2

A. Concerning Petitioners' Participation in the Case 2

1. Petitioners Did Not Cooperate in the Receivership 3

2. There Was No Consent Decree.... 4

B. Defendant Corporation Insolvent Within the Meaning of the Bankruptcy Act.. 4

C. Insolvency Within the Meaning of the Bankruptcy Act Precluded Equity Receivership 5

1. Equity Had No Jurisdiction..... 6

2. Abuse of Discretion 9

D. Receivership for the Benefit of the Debtor, Not the Creditors 11

E. Petitioners Deprived of Minimum Rights Under Bankruptcy Act 13

1. Safeguards for the Benefit of Creditors 14

2. Safeguards Absent in the Present Receivership 15

PAGE

II. **No. 727.** Order Relating to the Reorganization 18

A. There Was No Sale 18

B. Estimate Versus Actual Sale 19

C. Petitioners Entitled to Cash Proceeds of Actual Sale 22

D. The Question Is New in this Court 24

III. **Nos. 726 and 727.**

A. Petitioners Waived No Rights 26

CONCLUSION 27

Authorities Cited.

PAGE

B. Borchardt & Co. v. *Yarnyal Naval Stores*, 206 Fed. 366 24

Carr v. *Zaja*, 283 U. S. 52 26
Chic. R. I. & Pac. Ry. v. *Lincoln*, 284 Fed. 955.... 25
J. B. & J. M. Cornell Company, 186 Fed. 859 22

Gay v. *Hudson River Electric Power Co.*, 184 Fed. 689, 693-4 23
Geddes v. *Anaconda Co.*, 254 U. S. 590 19

Harkin v. *Brundage*, 276 U. S. 36, 52 ..... 8, 27
Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371 .....6, 13, 27

Kneeland v. *American Loan Company*, 136 U. S. 89, 97 23

L. & N. R. R. Co. v. *Behlmer*, 169 U. S., 644, 648.. 26

Matthews v. *Rodgers* (No. 84, decided on Feb. 15, 1932) 7
Merchants Loan & Trust Co. v. *Chicago Railways Co.*, 158 Fed. 923, 928-9 23
In Re Metropolitan Ry. Receivership, 208 U. S. 90, 109, 111 ..... 8, 27
Municipal Financial Corporation v. *Bankus Corporation*, 45 F. (2) 902, 906 ..... 8, 11

In Re Northampton Portland Cement Co., 185 Fed. 542, 543 ..... 22, 23
Northern Pacific Railway v. *Boyd*, 228 U. S. 482... 20, 27

Phipps v. *Chic. R. I. & Pac. Ry.*, 284 Fed. 945..... 25
Price, Receiver v. *United States*, 269 U. S. 492, 502 13

PAGE

In Re Prudential Outfitting Company, 250 Fed. 504 22, 23
Pusey & Jones Co., v. *Hanssen*, 261 U. S. 491, 497, 500 ..... 8, 27

Rock Island Cases, 284 Fed. 945 and 284 Fed. 955; 261 U. S. 611; 262 U. S. 762 25
In Re Sales of Assets of First National Bank of Florence, 6 F. (2) 905, 910 23

Simmons Co. v. *Grier Bros.*, 258 U. S. 82 26
Stratton v. *St. Louis Southwestern Railway Company*, (No. 178 Oct. Term 1931, decided Feb. 15, 1932) 284 U. S. ——. 7, 9, 27

The Conqueror, 166 U. S. 110, 113 26
Toledo Co. v. *Computing Co.*, 261 U. S. 399, 418.... 26

United States v. *Butterworth-Judson Co.*, 269 U. S. 504, 513-4 .....8, 13, 27

Legislative Bases of Corporate Reorganizations, 80 Penn. Law Rev. 579 25

White v. *Coriell: A Recent Development in the Law of Corporate Reorganizations*, 45 Harv. L. Rev. 697 24

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

Nos. 726 AND 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners
(Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent
(Appellee Below),

MORRIS WHITE, INC.,
Respondent
(Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent
(Appellee Below),

MICHAEL HOLLANDER, *et al.*, Constituting a Committee of Creditors of Morris White, Inc.,
Respondents
(Appellees Below).

PETITIONERS' REPLY BRIEF.

Since the two cases are so interwoven that it is impossible to treat of one without touching on the facts and points of law in the other, we thought it would be better to reply to respondents' statements and arguments in a

single brief, answering first the points which relate to the order making the receivership permanent (No. 726), then the points with reference to the order of the Circuit Court of Appeals on the reorganization plan (No. 727), and finally the point raised with reference to both cases.

No. 726.

I. Order Making Receivership Permanent.

A. Concerning Petitioners' Participation in the Case.

In this case respondents would make it appear that petitioners have submitted to and acquiesced in the rulings of the District Court and have, in fact, consented to the decree making the receivership permanent.

Respondents' development of the facts in this respect is somewhat misleading. The record is replete with objections on the part of petitioners to the Equity Court's exercise of jurisdiction in the instant case. From the very beginning petitioners maintained that since the defendant corporation was insolvent within the meaning of the Bankruptcy Act, the Equity Court should not exercise jurisdiction to administer the estate, but should leave the administration of such an estate to the Bankruptcy Court.

The first opportunity petitioners had to object to the receivership and to the so-called reorganization plan was on the return to the rule to show cause why the offer of Lily White should not be approved. That was on May 26, 1931. Petitioners objected to the adoption of the offer on the ground that there was no schedule of assets and liabilities (R., 82) or of the net worth of the corporation (R., 86); also on the ground that the facts disclosed a bankruptcy "which is nearly 100 per cent." (R., 86) and that the entire plan was merely for the benefit of the sole stockholder of the defendant corporation, to wit, Morris White, husband of Lily White (R., 85).

On the next day, May 27th, petitioners sought an opportunity to examine the defendant, "in view of the fact that this is a bankruptcy" (R., 96). But petitioners' counsel was at the same time engaged in an important criminal trial and asked for a short postponement (R., 97). Petitioners renewed their complaint that no adequate statement of assets and liabilities had been furnished (R., 156-7). The Court, after having intimated that it would give petitioners a chance to examine Morris White, the president of the defendant corporation, itself conducted the examination (R., 173), despite the objections of petitioners that they had no opportunity to examine (R., 180-1). Immediately after the examination, of which more will be said later, the Court announced that it would approve the reorganization plan, granting an exception to the dissenting creditors (R., 195).

On the next day, May 28th, counsel for petitioners filed an affidavit (R., 198-202) praying that the plan be rejected and disapproved and that the receivership be vacated. Nothing further transpired until June 3, 1931, when the Court rendered its decree making the receivership permanent (R., 209-218).

Respondents, however, would make it appear that petitioners cooperated in the receivership and the reorganization plan, that they consented to the decree making the receivership permanent, and then for the first time objected to that receivership.

1. *Petitioners Did Not Cooperate In The Receivership.*

Respondents go so far as to say (See p. 9 of their brief) that a representative of the National Surety Company "became a member *ex officio* of the Creditors' Committee (R., 110)." But page 110 of the record does not bear out that statement. Instead, we find that a representative of the National Surety Company requested not to be put on the committee, although "the Committee re-

quested him to come on, *ex officio.*" It would seem that there is a difference between being a member of the committee and refusing to be a member.

2. *There Was No Consent Decree.*

Respondents also state that the decree sought to be reviewed was entered on consent and was therefore not subject to review (Respondents' Brief, p. 7). We do not understand the meaning of this statement, in view of the fact that the record, as we have just shown, is replete with objections on the part of petitioners to the Equity Court's exercise of power in this case. In view of the state of the record, it is surprising that respondents should appear in *this* Court and maintain that the decree of the District Court was a consent decree not subject to review. We can only say that this statement falls in the same category with respondents' statement (p. 9 of their brief) that petitioners' representative was a member *ex officio* of the Creditors' Committee.

Petitioners rely on the statement in the decree of June 3, 1931 that there was no opposition to the making of the receivership permanent (R., 209). But that is in line with the District Court's statement that Lily White's offer was one to *purchase* the assets of Morris White, Inc. (R., 227 in case No. 727). Suffice it to say that the Circuit Court of Appeals did not take either of those statements seriously.

B. Defendant Corporation Insolvent Within The Meaning of the Bankruptcy Act.

The two facts necessary for petitioners' contention in this case are undisputed and are brought out by the findings of both the District Court and of the Circuit Court of Appeals. The findings are, and there is ample evidence to support them, that the defendant corporation was insolvent and that it was not in a position to pay its cred-

itors. A state of bankruptcy was admitted by counsel for the defendant (R., 70), the District Court saw that the defendant was insolvent (R., 74-5), it was apparent on the face of the financial statement, such as was available (R., 83-4), the defendant had no liquid assets with which to satisfy any part of the debts (R., 74, 143). The District Court said (R., 191, 192):

> "My view, stating it very shortly, is this:
> "That if the estimate of value which has been placed upon the assets of the defendant corporation is anywheres near correct, it means, if this concern goes into liquidation, that the general creditors will get little or nothing as a result, * * *
> "I agree that the proposed reorganization is more or less of an attempt by Mr. White to lift himself by his bootstraps, in that there is here no capital with which to finance the new concern, save such as he thinks may be received on his business record from others who are favorably disposed toward him. All of us know, unfortunately too well, the present condition of business."

In commenting on the financial condition of the defendant corporation, and after stating the various estimates of its assets and liabilities (R., 234) the Circuit Court of Appeals said (R., 238):

> "Assets of an insolvent commercial corporation have long been recognized as a trust fund for the payment of its creditors."

C. Insolvency Within the Meaning of the Bankruptcy Act Precluded Equity Receivership.

With both courts finding the defendant corporation insolvent within the meaning of the Bankruptcy Act, we maintain that the Equity Court should not have continued the receivership, should not have approved the reorganization plan and should not have made the receivership permanent.

1. *Equity Had No Jurisdiction.*

The petition for the appointment of a receiver was filed by a simple contract creditor, alleging that the defendant corporation was solvent, but financially embarrassed and not able to pay its debts; and that if all of the creditors should pursue their remedies against the defendant and levy upon its assets, there would not be enough with which to pay the debt owed to the plaintiff. These allegations were by way of showing that the Equity Court had jurisdiction in the case to appoint a receiver and conserve the assets for the benefit of the creditors, and that the plaintiff had no adequate remedy at law.

The receiver, however, could not be appointed upon application of the simple contract creditor without the consent of the defendant.

> *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371.

It could defeat the application either by denying that the plaintiff had no adequate remedy at law, or by denying that the defendant was solvent.

The denial of "no adequate remedy at law" would have required the plaintiff to exhaust her remedies at law by obtaining a judgment on her contract. If the execution were returned *nulla bona*, then the Equity Court would be in a position to proceed with the receivership, provided the defendant were solvent. If the defendant denied that it was solvent, then it would become apparent that the plaintiff's remedy was under the Bankruptcy Act.

For this reason it has been held that a receiver can not be appointed upon application of a simple contract creditor, unless there is consent on the part of the defendant corporation, which admits that there is no adequate remedy at law, and also that it is solvent.

In view of the recent decisions of the Supreme Court, with reference to equity jurisdiction, the following ques-

tion arises: If, upon the admission of the defendant that the plaintiff has no adequate remedy at law, the Equity Court appoints a temporary receiver, and then it appears that the defendant at the time of the application was insolvent within the meaning of the Bankruptcy Act, should the Equity Court continue the receivership?

The cases we refer to are *Stratton* v. *St. Louis Southwestern Railway Company* (No. 178 Oct. Term 1931, decided Feb. 15, 1932) and *Matthews* v. *Rodgers* (No. 84, decided on the same day).

The first of these presents the stronger case. There, the railroad company brought suit to enjoin the collection of a tax, stating that it had no adequate remedy at law. The Secretary of State of Illinois, being anxious to have the constitutionality of the tax settled, and not realizing that the plaintiff had an adequate remedy at law by paying the tax and suing to recover the same, admitted the allegation.

Both the District Court and the Circuit Court of Appeals in the first proceeding and then the statutory three judge District Court in the second proceeding accepted the admission of the allegation, which gave the Equity Court jurisdiction, and enjoined the collection of the tax.

After the case was argued in this Court four times, it was held that the plaintiff did have an adequate remedy at law. The decree was reversed, and the cause remanded with directions to dismiss the complaint for lack of jurisdiction. That case stands for the proposition that the jurisdictional requirement of a lack of an adequate remedy at law cannot be waived by the defendant, and that as soon as the equity court finds that there is an adequate remedy at law, it must cease entertaining jurisdiction in the case.

Does the same rule apply in these friendly equity receiverships where the plaintiff alleges and the defendant admits that the defendant is solvent, but in the course of the proceedings it appears that the defendant was at all times insolvent within the meaning of the Bankruptcy

Act? What should the Equity Court do? Should it dismiss the case and relegate the plaintiff to his remedy at law provided by the Bankruptcy Act, as was done by Judge Woolsey in the case of *Municipal Financial Corporation* v. *Bankus Corporation*, 45 F. (2) 902, or should the Equity Court continue to exercise jurisdiction in an equity receivership and usurp the functions of the Bankruptcy Court, as was done in the present case?

This court has long looked with disfavor on "friendly" receiverships, in which the jurisdiction of the Equity Courts is invoked for the purpose of hindering creditors and of enabling the defendant in receivership to escape its obligations. In the case of *Harkin* v. *Brundage*, 276 U .S. 36, this Court, in an opinion by Chief Justice Taft, said (p. 52):

> "We do not wish what we have said to be taken as a general approval of the appointment of a receiver under the prayer of a bill brought by a simple contract creditor simply because it is consented to at the time by a defendant corporation. The true rule in equity is that under usual circumstances a creditor's bill may not be brought except by a judgment creditor after a return of 'nulla bona' on execution. When a receiver has been thus irregularly appointed on such a bill without objection, and the administration has proceeded to such a point that it would be detrimental to all concerned to discharge the receiver, the receivership has been permitted to continue because not seasonably objected to (*Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497, 500; *Re Metropolitan Ry. Receivership*, 208 U. S. 90, 109, 111; *United States* v. *Butterworth-Judson Corp.* 269 U. S. 504, 513)."

In the cases cited by the Court in *Harkin* v. *Brundage*, this Court did not order the termination of the friendly receiverships, because those receiverships had not been seasonably objected to, and after the receiverships continued for considerable time without objection, it would

have been detrimental to all concerned to discharge the receivers.

In this case the objection to the receivership was seasonably made (See pp. 2-3, supra). The receivership was continued by the equity court, despite the continuous objections on the part of the non-assenting creditors. Furthermore, there would be nothing lost by terminating the receivership, for the only changes which had taken place were in form, not in substance. (See the reorganization plan, p. 10, infra). Therefore, the present case does not fall within the class of cases in which the friendly receiverships were permitted to continue.

It will also be remembered that those cases were decided before the decision of this Court in *Stratton* v. *St. Louis Southwestern Railway Company;* that is to say, before this Court had put a stop to the practice of invoking the jurisdiction of equity courts in cases where equity courts had no jurisdiction. Those cases permitting the receiverships to continue were rendered at a time when there were also suits to enjoin the collection of taxes, and the jurisdiction of the equity courts was not disturbed, although the plaintiffs had an adequate remedy at law. The question presented here is one of the fundamental jurisdiction of the courts of equity as applied to what it generally termed as equity receiverships.

2. *Abuse of Discretion.*

If, however, the continuance of the equity receivership is still within the sound discretion of the court, despite the insolvency of the defendant, then we submit the district court abused its discretion. In this connection we again stress the salient facts concerning the offer of Lily White to "purchase" the property of Morris White, Inc.

Morris White, according to his own testimony, was the *alter ego* of Morris White, Inc. (R., 181). Mrs. White, in her offer to purchase, contributed no cash or any other assets, or any security (R., 82), and so far as it appears,

after having made the offer, vanished from the picture entirely. The common stock, that is, the voting stock of the new corporation to be organized under this offer, was to be held by Morris White himself (R., 235).

Stripped of all fiction and camouflage, the "purchase" approved by the District Court sitting as a *Court of Equity*, amounts to this: that Morris White, having debts aggregating $1,072,000, would first undertake to pay $158,000 owed in taxes, would pay the sum of $50,000 in administration expenses, and also an indeterminate fee for counsel for the friendly creditors, receiver and himself, and then would deal with his creditors by giving them unsecured, unindorsed, non-interest bearing notes for 20% of their claims, while the remainder, 80%, would be wiped out by an issue of preferred non-voting stock; the business, if any, would be carried on as heretofore, except that Morris White would be assured of $60,000 per year and nothing further would be said about the $2,000,000 he had diverted from the corporate funds.

Practically all of the assenting creditors either gained, else did not lose anything by this arrangement. The federal and state governments were to be paid outright; Vincent Astor, the landlord, was interested in keeping the premises occupied (R., 101-2); others had a different axe to grind (R., 152). It would seem that such an offer of "purchase" with a view of paying off creditors, would shock the conscience of any Chancellor. Instead of seeking an equitable distribution of the assets of the corporation among the creditors, it appears that a fraud* was sought to be perpetrated upon the court and upon the dissenting creditors. Yet the District Court approved the plan over the objections of those creditors, whose claims aggregated over $120,000 (R., 198-201).

---

* It appears that after the case was remanded to the District Court, a new claim for $1,025,000 suddenly came to light. This probably explains why petitioners' repeated demands for a certified statement of the assets and liabilities were not complied with. We are filing with the Clerk a certified copy of the claim and of the rule to show cause issued by the District Court.

The function of an equity receivership is to preserve the assets of a solvent corporation, so that all the creditors, rather than some of them, might be paid. In granting a receivership, an equity court in effect prevents each of the creditors from exercising his legal rights and declares a moratorium for the purpose of conducting the business of defendant for the benefit of all the creditors. In granting such relief, the *probabilities* must be that the creditors will be paid in full. For if the probabilities are that the creditors will not be paid in full, then the equity court would usurp the functions granted by law to the bankruptcy courts.

This test for continuing the receivership fails in the present case. There was nothing in the record to point to any condition which would lead to the conclusion that the creditors would be paid within a reasonable time. When asked whether any cash at all could be paid to the creditors at this time, counsel for the defendant answered that that would be impossible (R., 143). The District Court did not arrive at the conclusion that the plan showed promise of success so far as creditors were concerned. On the contrary, the court treated the entire matter as a hopeless proposition (R., 192).

D. Receivership for the Benefit of the Debtor, Not the Creditors.

While an Equity Court may declare a moratorium for the purpose of safeguarding the interests of all creditors, it may not keep the defendant in receivership for its own benefit at the expense of the creditors. "There is not any right of sanctuary in an equity receivership in the Federal court", said Judge Woolsey in *Municipal Financial Corporation* v. *Bankus Corporation*, 45 F. (2) 902, 906. Yet, that is just what the entire reorganization plan amounts to. It is a plan to relieve Morris White of a great part of his indebtedness.

Much was said by the friendly creditors pointing out Morris White as a philanthropist and benefactor of humanity in order to influence the equity court to give White another chance, or, as one of the creditors put it, "to see that justice to Morris White is done" (R., 104). After dwelling at length on the fine qualities of Morris White, which we do not need to dispute because the entire matter was irrelevant, this same creditor said: "* * * if this man is given an opportunity to come back and put three or four thousand* people to work, not a cent will be lost to anyone; everyone will receive their money back" (R., 105). Another creditor frankly admitted that his interest in the case was not so much to save the $20,000 owed to him by Morris White, Inc., as it was to put Morris White back into business so that he, the creditor, might profit by selling metal parts to the new corporation (R., 152).

In short, in this receivership proceeding, the friends of Morris White sought to put him back into business without the burden of his obligations. That was the essence of the reorganization.

If the plan was not to benefit Morris White, what need was there for the organization of a new corporation, another name for Morris White? What need was there for the issuance of preferred stock? The court itself treated this plan as one to benefit Morris White, although it did not take seriously his claim of ability to rehabilitate himself. The court naively permitted such reorganization, because it knew of no "wrongdoing on the part of Mr. White in the management of his business, save and except the freedom that he exercised in taking assets (about $2,000,000!) of this corporation and devoting them to his other business ventures"—the stock market, real estate (R., 102) and a directorship in the Bank of United States (R., 176). The Court told him that he must not do that during the receivership (R., 192).

---

* He must have meant four or five hundred. See R., 166.

Since the plan was not one for relief of creditors, but for relief of the stockholder of the defendant corporation, we submit that the district court abused its discretion in making the receivership permanent.

E. Petitioners Deprived of Minimum Rights Under Bankruptcy Act.

We have stated in our petition and brief that the making of the receivership permanent deprived petitioners of rights under the Bankruptcy Act. To this the respondents have answered (Resp. Brief, pp. 11-12) that the petitioners were not deprived of their right to file a petition in bankruptcy. We admit respondents' statement, but that is not our contention. If we have not made ourselves sufficiently clear, we beg leave to do so now.

Our argument is not that the filing of the receivership proceeding deprived the petitioners of their right to file a petition in bankruptcy, but that the administration of the estate in the Equity Court, together with the fictitious sale of the property of the defendant corporation to Lily White, operated to deprive petitioners of certain minimum rights which are contained in the Bankruptcy Act.

Had there been no consent to the receivership, it could not have taken place on petition of a simple contract creditor.

> *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371.

This was therefore a consent receivership, equivalent to an assignment of the assets for the benefit of creditors.

> *Price, Receiver* v. *United States*, 269 U. S. 492, 502;
>
> *United States* v. *Butterworth-Judson Co.*, 269 U. S. 504, 513-4.

This means that if the defendant was solvent, as was alleged in the petition for receivership, then the creditors were entitled to payment in full. If, on the other hand, the corporation was insolvent, then the assets of the corporation became a trust fund to be distributed among the creditors according to their rights and priorities under the Bankruptcy Act. But if the latter is the case, then the Bankruptcy Act provides many safeguards preventing the diminution of the portion recoverable by the creditors.

1. *Safeguards for the Benefit of Creditors.*

Among the safeguards provided by the Bankruptcy Act are: (1) Preferential payments are prohibited, (2) The charges on the administration of the bankrupt estate and for counsel fees are carefully supervised and are subject to objection on part of the creditors, (3) The bankrupt estate must be appraised by disinterested appraisers; the appraisals must be made available to creditors, (4) A bona fide sale of the property must be made prior to distribution, (5) If a "composition" is allowed, then the bankrupt must be examined at a meeting of creditors, and he must file a schedule of assets and liabilities, (6) Compositions must be accepted by a majority of creditors in number and amount, (7) Security must be furnished by the bankrupt for the discharge of obligations assumed in a composition, (8) No composition may be approved, if the bankrupt was guilty of acts of commission or omission which would be a bar to his discharge in bankruptcy, (9) In case of composition, non-assenting creditors must be paid in money at least a portion of their claims.

2. Safeguards Absent In the Present Receivership.

Of these advantages, or safeguards, petitioners are being deprived by the permanent receivership and by the transfer of the assets of the defendant corporation to a new corporation, under the guise of a sale:

(1) In the present case the District Court permitted, nay *directed*, a preferential payment to a judgment creditor (R. 65-6, 72-75), and immediately after the reorganization order was approved, but before the decree was rendered, the court approved the payment in full to a large number of small creditors (R. 194-5).

(2) The administration expenses during the first seven weeks of the receivership were estimated at $50,000 over and above an indeterminate amount to be paid to counsel for the Creditors' Committee (R., 149-50). In addition the estate would be subject to an annual charge of $60,000 in the form of a salary for White himself (R. 168).

(3) No inventory was ever given to the court, nor was a judicial appraisal made. The objecting creditors have demanded a certified statement of the assets and liabilities of the defendant corporation, but none was forthcoming (R. 180-4).

(4) Although the offer of Lily White was one of "purchase", there was really no purchase or sale involved. (See p. 10, supra.)

(5) There was no examination similar to that conducted under Sec. 21-A of the Bankruptcy Act. The District Court having been requested to grant petitioners an opportunity to examine Morris White under oath, intimated that it would appoint a Special Master to take testimony (R. 97). But then the court undertook to examine Morris White, without giving petitioners an opportunity for cross-examination. For all of the evi-

dence was in possession of the defendant and the receiver, and it was not made available to petitioners. The examination conducted by the Court (R. 173-179) was more in the nature of a friendly chat in which Mr. White informed the Court that his failure in business was not due to any mismanagement of the corporation (R. 176), but only to the fact that he "took" the corporation's money and lost it in other enterprises. (R. 176).

(6) Instead of holding Morris White liable to the creditors for the corporate fund diverted by him, which together with the other assets would have been sufficient to pay all of the debts of the corporation, Morris White was permitted to get away with a promise or fond hope that, within less than four or five months, he would give his 150 creditors and five bankers "a nice little dinner, and have a check to go in full right on the plate, on the 20% of notes." (R., 175). The time has passed, and the creditors saw neither the check nor the dinner. And many a dinner will be missed by creditors if the Equity Courts throughout the country will undertake to condone diversion of corporate funds at the expense of creditors.

(7) Throughout the proceedings, the Creditors' Committee claimed to represent the majority of creditors, both in number and amount. But though this claim was challenged (R. 101), no proof to that effect was submitted to or required by the Court.

(8) *In fine*, no security was offered to guarantee the payment of the claims; and no cash was offered to pay the creditors in whole or in part.

No doubt respondents are right in saying that bankruptcy supersedes receivership and that the jurisdiction of the Bankruptcy Court within its proper sphere is essentially exclusive. But unless the decree of the District Court making the receivership permanent is set aside, the creditors will find no assets of the bankrupt from

which they may expect payment of the bankrupt's liabilities. By the magic change in the corporate name, the defendant corporation becomes an empty shell with no assets to be reached by the creditors. The exercise of rights in bankruptcy, to be effective, must be predicated on the assumption that the Bankruptcy Court will undo all that the Equity Court has done. A Court of Equity should not put itself in such a position.

That is why we maintain that under the receivership in the present case, petitioners were deprived of certain minimum rights which they had under the Bankruptcy Act; that is a situation which is likely to result whenever an Equity Court undertakes to administer property of an insolvent corporation; and that is why it has been repeatedly held that when it appears that a defendant in a receivership proceeding is insolvent within the meaning of the Bankruptcy Act, the Equity Court should not proceed to administer a bankrupt estate under the guise of an equity receivership.

No. 727.

II. Order Relating to the Reorganization.

The order sought to be reviewed in this case is the one modifying the order of the District Court rendered June 15, 1931, approving an offer of Lily White, the wife of Morris White, to "purchase" the assets of Morris White, Inc.

A. There Was No Sale.

We do not agree with respondents that the fairness of the reorganization plan approved by the District Court is not before this Court. That would have been so, if petitioners were given an aliquot share of the proceeds of a public sale, or of a bona fide private sale, conceded to yield as much as could be realized at a public sale. Here, however, as the court below said (p. 263):

> "There was no public sale and therefore no competitive bidding. Apparently what took place below was that an offer was made by Mrs. White for all the assets. The creditors' rights thereto were wiped out. They were directed to take preferred stock and notes. By the acceptance of the offer, the new corporation obtained the assets of the old Morris White, Inc. No new money or assets were provided. *If the transaction be termed a sale*, it was not a public sale." (Italics supplied.)

That there was really no sale, public or private, has already been demonstrated (pp. 9-10, supra).

The Circuit Court of Appeals could not sustain such a departure from law and equity. It held that whatever may be the rights of assenting creditors to enter upon a joint business career with Morris White, the District Court was without authority so to dispose of the contractual rights of the objecting creditors. It therefore

reversed the order of the District Court and held that the objecting creditors were entitled to payment in cash.

The propositions of law, on which this judgment was based, are well recognized and are the very propositions of law on which petitioners rely in their claim that the Circuit Court of Appeals did not go far enough in reversing the decree of the District Court. The court below said (R. 258, 263, 264):

> "Assets of an insolvent commercial corporation have long been recognized as a trust fund for the payment to its creditors. It has likewise long been recognized that contract obligations may not be impaired by the courts. * * * Private property may not be taken in violation of contract obligations. * * * The assets of the corporation may not be used as a fund for the benefit of the debtor rather than a creditor. * * *
>
> "We are unable to find authority for the claim of the appellees that the court has power to compel a creditor of any kind to accept stocks or promises to pay in the future in full extinguishment of his claim, without being afforded the alternative of receiving his proportionate share of the proceeds of the conventional sale of the property in cash. * * *
>
> "Their rights must be protected. They are ordinarily entitled to a public sale with competitive bidding, the assets to be sold to the highest bidder."

B. Estimate Versus Actual Sale.

But the court did not order a sale of the property in order to protect those rights of the objecting creditors. It merely ordered that an estimate be made of the assets of the defendant corporation, and that the objecting creditors be paid an aliquot share of the estimate.

In ordering that the value of the corporation's assets be estimated, the court below relied on the case of *Geddes* v. *Anaconda Co.*, 254 U. S. 590. We submit that neither that case, nor the others mentioned in the opinion, sup-

port the ruling of the Circuit Court of Appeals. In that case the conflict was not between the interests of the stockholders and those of creditors, but a conflict among stockholders themselves. Yet, even there, this Court held that the reorganization could be effected by the exchange of the properties of the corporation for the stock of another corporation only because the stock received in exchange had a definite and ready market value.

Here the objectors to the reorganization plan are not stockholders, but creditors, whose interests are apt to be sacrificed in an effort to reestablish the sole stockholder in the business. It is a settled proposition of law that any reorganization which recognizes and preserves the interests of the stockholders at the expense of creditors is invalid.

Northern Pacific Railway v. *Boyd*, 228 U. S. 482.

And the plan adopted by the Circuit Court of Appeals did not give sufficient protection to the creditors, from being subordinated to the interests of the stockholder.

Looking into the assets of this corporation, including the debt of about $2,000,000 owed by Morris White to the defendant corporation, it is submitted that the order of the court below is too indefinite and is impossible of performance.

It is not humanly possible for a Special Master in April, 1932, to determine what would have been realized for the assets, if sold at public auction in April, 1931. It is impossible to reconstruct the situation as it existed a year ago. Furthermore, the record shows that no inventory had been taken at the time of the appointment of the receiver nor at the time of the so-called "sale" of the property to Lily White; and there is no way of telling now what persons would have bid at the public auction for the property in April, 1931, and what would have actuated their bids.

Assuming that the estimate is to be made of a highest bid, not as of April 1931, but as of the present time, the order is still too indefinite and uncertain to safeguard the rights of creditors. This is not like estimating the value of a life estate based upon mortality and probability tables, where, after a tremendous amount of actuarial research, the probable error is reduced to a minimum. It is also unlike an estimate of the value of a particular piece of property which also may be determined with some degree of certainty. Here the problem is to estimate the amount of *a highest bid at a public sale,* and it is a matter of common knowledge that the variations are very wide among highest bids on the same type of property.

Assuming that an estimate is to be made, not of a highest bid at a public sale, either as of April, 1931, or as of the present, but of the value of the property itself, what should be the basis for valuation? If the valuation is to proceed upon the allegation in the complaint and the admission in the answer that the corporation was solvent, then there is no need for an estimate. The value of the notes and of the preferred shares is then at least the full amount of the debt. If the estimate is to proceed on the assumption that the corporation is insolvent, then should the valuation proceed on the reproduction cost theory, on the value of the assets to Morris White himself, on the prudent investment theory, or on the book value of the assets of the corporation? Should each item of the assets be valued separately or should the business be valued as a whole? What consideration should be given to such intangible items as "good will", "going concern value", "trade names" and "choses in action"? What, for example, should be done about the preferences allowed by the District Court? At last, the additional question arises, if the aliquot interest is less than the amounts of the debt owed to each creditor, by what right will the stockholder retain an interest in the property?

These are but a few of the difficulties which present themselves in connection with the modification of the reorganization plan ordered by the Circuit Court of Appeals.

C. Petitioners Entitled to Cash Proceeds of Actual Sale.

For this reason, petitioners maintain that nothing short of a public sale would adequately determine their share in the assets of the corporation.

We have referred this Court to a number of authorities sustaining our contention. To this respondents answered that the authorities cited were not in point (Respondents' Brief, p. 9), without, however, disclosing their reason for saying so. An examination of those cases will disclose that the authorities cited are in point.

In re Prudential Outfitting Company, 250 Fed. 504, is a decision holding that a creditor cannot be compelled to accept an aliquot interest in the assets of a corporation under the guise of a sale. In that case there was a reorganization plan somewhat similar to the one involved here, and the court held that such plan could not be forced upon a dissenting creditor. An actual sale had to take place even in the event of a reorganization, and, the court added: "the dissenting creditors must be paid their own proportion of the bid, which is their inviolable right." (p. 507).

In the case of *J. B. & J. M. Cornell Company*, 186 Fed. 859, the same court refused to confirm a sale solely for the reason that the bid required non-assenting creditors to accept a percentage of their claims payable in the future—a much less drastic provision than the one in the present case.

To the same effect is *In Re Northampton Portland Cement Co.*, 185 Fed. 542, 543, where the court thought that the proposed plan offered the creditors their only

opportunity of obtaining any payment upon their claims. But the court said:

> "Assuming the plan to be judicious, the question remains: Has the District Court any authority to enforce it? The fact that it has been approved by a large majority of the creditors is not decisive."

And the court then set aside the reorganization plan.

We cited some cases for the purpose of showing that this rule applies not only to private corporations, but also to quasi-public corporations, like national banks,

> *In re Sales of Assets of First National Bank of Florence*, 6 F. (2) 905, 910,

railroads,

> *Kneeland* v. *American Loan Company*, 136 U. S. 89, 97,

and other public utilities,

> *Merchants Loan & Trust Co.* v. *Chicago Railways Co.*, 158 Fed., 923, 928-9,
> *Gay* v. *Hudson River Electric Power Co.*, 184 Fed. 689, 693-4.

Perhaps respondents mean that the cases were not in point, because in some of them the attempts to force an aliquot interest on the dissenting creditors were made in bankruptcy proceedings. If so, note that Judge Learned Hand, delivering the opinion in the *Prudential Outfitting Company* case, *supra*, said:

> "Bankruptcy does not change the character of the creditors' claims, which are measured by, and collectible in money."

The *ratio decidendi* was that such are the rights of creditors without bankruptcy, and that the bankruptcy did not affect those rights.

Respondents are not satisfied with stating that the authorities cited by petitioners do not support their contention. They state further (page 9) "*None can be cited.*"

We therefore respectfully refer this Honorable Court to the case of

> *B. Borchardt & Co.* v. *Yarnyal Naval Stores*, 206 Fed. 366,

for the proposition that, if an actual sale is not had, the only way of satisfying an objecting creditor is by paying him off in full.

D. The Question is New in This Court.

If all the above points are resolved in favor of the respondents, the question in this case reduces itself to this: Granting that dissenting creditors are entitled to their proportionate share of the assets of the defendant corporation, must the court order a sale, or may it cause an estimate to be made of the assets and allow to each creditor his aliquot part of the estimate? This question has never been decided by this Court.

The decree of the court below has been treated as a radical departure from the accepted rules concerning the rights of creditors in corporate reorganizations, in an article entitled:

> *White* v. *Coriell:* A Recent Development in the Law of Corporate Reorganizations, 45 Harv. L. Rev. 697.

It is an able discussion of the subject, though we do not agree with its author that such development is desirable, or that the estimates would give less difficulty than a judicial sale.

Another illuminating article on the same subject appears in the February, 1932, issue of the Pennsylvania Law Review and is entitled:

> Legislative Bases of Corporate Reorganizations, 80 Penn. Law Rev., 579.

This article also takes the position that such a departure from the accepted course of corporate reorganizations would be desirable, but it rightly maintains that equity courts have no power to make such departure without legislation authorizing it.

The author also takes the position that even if the courts had the power so to override the will of dissenting creditors, it would not be advisable to exercise such power without express legislative sanction.

As to the power of the equity courts to dispose of the rights of creditors on the basis of an estimate, rather than on the basis of an actual sale of the properties, the author of the latter article says:

> "In America, the right of the court so to act, in the absence of enabling legislation is evidenced only by the *Rock Island* cases. Thus it would seem that those decisions are at best questionable. It is greatly to be regretted that the Supreme Court was not given the opportunity to review them" (p. 584).

In the *Rock Island cases*, 284 Fed. 945 and 284 Fed. 955, involving a reorganization of a public utility, the unsecured creditors were allowed an aliquot part of the assets in stock which had a ready market value in cash.

This Court granted a writ of certiorari in the case, 261 U. S. 611, but afterwards the case was dismissed per stipulation of counsel, 262 U. S. 762.

III. Nos. 726 and 727.

A. Petitioners Waived No Rights.

In the *preliminary statements* of both cases, respondents would make it appear that petitioners had waived all right to object to either of the orders sought to be reviewed, because they participated in hearings before the Special Master after the case was remanded by the Circuit Court of Appeals. Our answer is that there is nothing in the record in these cases concerning any hearings before a Special Master, and the respondents' statement that in the future a motion would be made to dismiss the petitions on the ground that petitioners had waived all right of review, is not properly before the Court at the present time.

Furthermore, the fact that the Circuit Court of Appeals did not stay its mandate does not deprive this Court of jurisdiction to issue a writ directing the Circuit Court of Appeals to certify the case, so long as the case has not become moot.

> *The Conqueror*, 166 U. S. 110, 113.
> *L. & N. R. R. Co.* v. *Behlmer*, 169 U. S. 644, 648.
> *Carr* v. *Zaja*, 283 U. S. 52.

The fact that the decision of the Circuit Court of Appeals is not "final", in the sense of the term used concerning the finality of judgments of state courts, likewise does not affect this Court's jurisdiction.

> *Simmons Co.* v. *Grier Bros.*, 258 U. S. 82;
> *Toledo Co.* v. *Computing Co.*, 261 U. S. 399, 418.

Conclusion.

1. In so far as the Equity Court was permitted to continue jurisdiction despite the insolvency of the defendant, the decision of the court below is contrary to the general rule laid down by this Court in

   Stratton v. *St. Louis Southwestern Ry. Co.*, 284 U. S. ——.

2. If the continuance of the jurisdiction was within the discretion of the District Court, then that court abused its discretion, and the Circuit Court of Appeals in affirming the order making the receivership permanent, permitted such a departure from the accepted and usual course of judicial proceeding, as to call for an exercise of this Court's power of supervision.

3. In so far as the receivership was continued despite insolvency, the decision of the court below is in conflict with the *principle** announced by this Court in

   Harkin v. *Brundage*, 276 U. S. 36, 52;
   United States v. *Butterworth-Judson Co.*, 269 U. S. 504, 513;
   Hollins v. *Brierfield Coal & Iron Co.*, 150 U. S. 371;
   Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491, 497, 500;
   In re: Metropolitan Ry. Receivership, 208 U. S. 90, 109, 111.

4. In so far as the receivership was continued for the benefit of Morris White and not for the benefit of the creditors, the decision of the court below is contrary to the principle laid down by this Court in

   Northern Pac. Ry. v. *Boyd*, 228 U. S. 482.

---

* On the facts the cases are distinguishable.

5. In so far as the court below held that, in the absence of a bona fide sale, non-assenting creditors may be paid an aliquot part of the estimated assets of the corporation, it has decided an important question of law, which has never been, but should be, settled by this Court.

Respectfully submitted,

GREGORY HANKIN,
CHARLES H. TUTTLE,
SAUL S. MYERS,
Counsel.

Dated, April 25, 1932.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1931.

No. [redacted] 8

NATIONAL SURETY COMPANY, et al.,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, et al.,
constituting a Committee of Creditors of Morris White, Inc.,
Respondent (Appellee Below).

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI.

GREGORY HANKIN,
CHARLES H. TUTTLE,
SAUL S. MYERS,
Counsel for Petitioners.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1931.

No. 726.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY, as Receiver of
Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*, Constituting a Committee of
Creditors of Morris White, Inc.,
Respondent (Appellee Below).

SUGGESTION OF A DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI.

Petitioners suggest that there is a diminution of the record in the above entitled cause and respectfully move that this Court issue its writ of certiorari herein, directed to the District Court of the United States for the Southern District of New York, commanding that court to certify and send to this Court certain additional transcripts of record in causes: Equity No. E 59-126 entitled *Valeria E. Coriell* v. *Morris White, Inc.* and Bankruptcy

No. 53927 entitled *In the Matter of The Morris White Handbags Corporation.*

The objects of this motion are as follows:—

In the petition for writ of certiorari in the above entitled cause, we have raised important questions of law as to the power and jurisdiction of the Equity Court in the receivership herein, where the corporation was insolvent at the time the petition for receivership was filed and assented to. The decision of these important questions of law should not be hindered by any disputes as to facts. Respondents, however, insist that the defendant corporation was solvent, despite the statements in the opinions of both the District Court and the Circuit Court of Appeals. But it is significant that at the same time, on April 13, 1932, an involuntary petition in bankruptcy was filed against The Morris White Handbags Corporation, the corporation to which the properties of Morris White, Inc. were transferred under the so-called sale to Lily White. It is also significant that although the petition in bankruptcy was *involuntary*, the act of bankruptcy alleged in that petition was that "on or about the 12th day of April 1932, they admitted in writing their inability to pay their debts and their willingness to be adjudicated a bankrupt on that ground" and consented in writing to the adjudication in bankruptcy.

At the same time the creditors filed a petition for the appointment of a receiver, and The Morris White Handbags Corporation consented to an order appointing a receiver.

We believe that the record in this bankruptcy case will resolve all doubt as to the insolvency of the defendant herein at the time the petition for receivership was filed. The Morris White Handbags Corporation, as the record in the present case shows, is substantially the same as Morris White, Inc., except that the original claims were reduced, by the reorganization plan, to 20%. If with 20% of the claims the corporation is bankrupt, it stands

to reason that it was bankrupt with 100% of the claims outstanding.

Petitioners also maintained that the Equity Court, by making the receivership permanent, deprived petitioners of certain rights guaranteed by the Bankruptcy Act, among them being a right to examine the defendant as to its assets and liabilities. Petitioners complained that although they had often requested that a certified statement of the assets and liabilities be furnished, no one would certify to the schedules filed. After the Circuit Court of Appeals rendered its judgment, a new claim in the sum of $1,025,000 suddenly came to light. If there are no other undisclosed claims, this would raise the amount of the claims to $2,097,000. Still, respondents represent (in their brief in rejoinder p. 5) that the amount of the claims is only $1,072,000.

We believe that the record of the proceedings in the District Court with reference to this new claim of $1,025,000 will obviate any dispute as to facts with reference to petitioners' argument concerning their rights under the Bankruptcy Act.

Respondents have indicated (Brief in Rejoinder p. 2) that any correction of the diminution of the record must be made in the lower court. That this Court has the power, on "suggestion of a diminution of the record and motion for a writ of certiorari", to order that subsequent proceedings be included in the record before the Court, is illustrated by the fact that on October 12th, 1931, this Court granted such motion in Case No. 41, *Painters District Council, etc.* v. *United States*, 284 U. S. . Therefore there should be no question as to the propriety of this motion to cause the record as to the new claim to be certified.

Whether this ancillary writ of certiorari may be used to include the record in a collateral proceeding, petitioners do not know. Frankly, we know of no instance where that was done. We see no reason, however, why the use of the ancillary writ should not be thus extended,

where the purpose is not to adjudicate matters in the proceedings thus certified, but rather to throw light on the matters properly before this Court, and to facilitate the determination of facts or to obviate unnecessary disputes as to facts.

Wherefore petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the District Court of the United States for the Southern District of New York commanding that court to certify and send to this Court all the records filed in connection with the claim of the Equitable Life Assurance Society in Equity cause No. E 59-126, *Coriell* v. *White*, and all the proceedings filed in Bankruptcy cause No. 53927, *In the Matter of The Morris White Handbags Corporation.*

Respectfully submitted,

GREGORY HANKIN,
CHARLES H. TUTTLE,
SAUL S. MYERS,
Counsel for Petitioners.

I, SAUL S. MYERS, counsel for the petitioners in the above entitled cause, do solemnly swear that the facts recited in the foregoing "Suggestion of a Diminution of the Record and Motion for a Writ of Certiorari" are true.

SAUL S. MYERS,
Counsel for Petitioners.

Subscribed and sworn to before me this 11th, day of May, A. D. 1932.

CHAS. MEYER, Notary Public, N. Y. Co.

FILE COPY

NOV 18

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 8.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners
(Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent
(Appellee Below),

MORRIS WHITE, INC.,
Respondent
(Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent
(Appellee Below),

MICHAEL HOLLANDER, *et al.*, Constituting a Committee of Creditors of Morris White, Inc.,
Respondent
(Appellee Below).

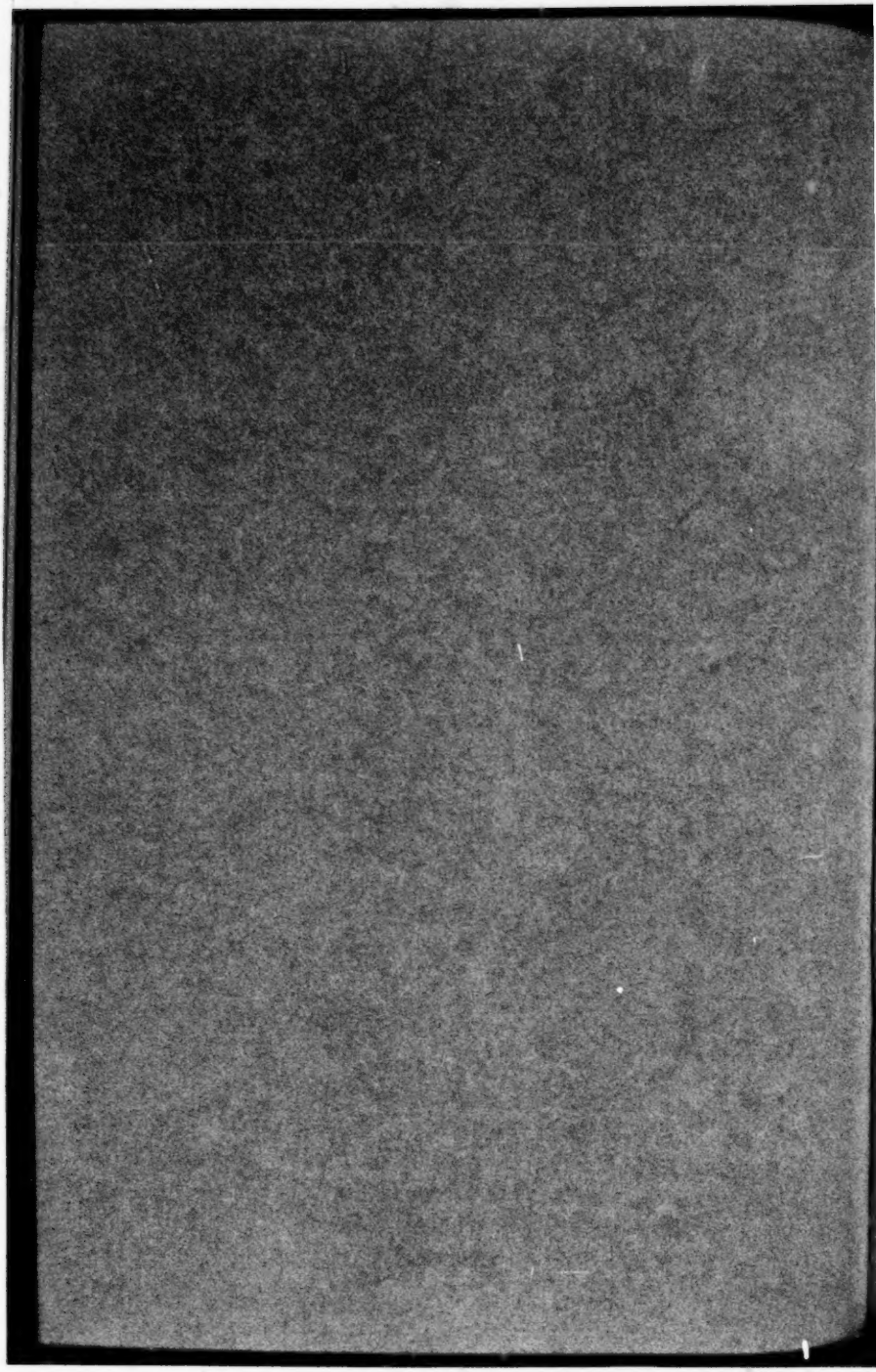
BRIEF FOR PETITIONERS ON WRIT OF CERTIORARI TO REVIEW ORDER OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 25, 1931.

CHARLES H. TUTTLE,
of New York,

GREGORY HANKIN,
of Washington,

SAUL S. MYERS,
of New York,

Counsel for Petitioners.



INDEX.

	PAGE
Brief for Petitioners	1
Opinions Below	2
Statement of Facts	2
Mr. Morris White	2
The Institution of the "friendly" Equity Receivership	3
The Bill of Complaint	4
The Offer of Mrs. Morris White, and the So-called Reorganization Plan	6
The Opposition to the White Offer	11
The Proceedings at the Hearings on the Offer	12
No Public Sale, and Competition Impossible	13
The Actual Picture was one of Bankruptcy and not of Equity	15
No Real or Competent Proof before the District Court justifying the Acceptance of the White Offer	16
The Action of the District Court on the Offer	17
Decision of the Circuit Court of Appeals	18
Assignment of Errors	19
Argument	20
First Point: The Court below erred in holding that petitioners' rights could be fully safeguarded by an estimate of what would have been realized upon a sale, rather than by a sale itself	20
The decision of the Circuit Court of Appeals comes, for all practical purposes, to the	

PAGE

same thing as the decision of the District Court 20

The decision of the Circuit Court of Appeals is too indefinite and is impossible of performance. It substitutes guesswork for reality as a measure of rights 22

SECOND POINT: The Court below erred in failing to hold that the property of the defendant corporation must be sold to satisfy the claims of the creditors; and erred in reversing only in part the decree of June 15th, 1931 25

The Decree of June 15, 1931 rested on no Known Principles of Law 25

The decisions deny the power exercised in the decree of June 15, 1931 28

The Boyd case, 228 U. S. 482 31

THIRD POINT: The Circuit Court of Appeals also erred in not pursuing the logic of its own decision and in not adjudicating that the petitioners were entitled to follow the assets and secure from them a full payment of their claims and not merely an aliquot share of what might possibly have been realized at a theoretical auction sale held six months previous 33

FOURTH POINT: In any event, and even if we are wrong in the foregoing contentions, the Court below should nevertheless have reversed the decree of June 15th, 1931, on the ground that, at the hearings on which that decree was heard, the case was disclosed to be one for a court of bankruptcy or, at least, not one for a court of equity. In any event, the Court below should have adjudicated the rights of the parties as if the case were in bankruptcy 39

PAGE

The case should have proceeded in bankruptcy, or, at least, should not have been continued in equity 39

In any event, the petitioners' rights should have been administered and safeguarded. 44

FIFTH POINT: The Circuit Court of Appeals erred in failing to reverse the decree of the District Court in so far as it held that the receivership costs, the fees of the attorneys for the receiver, and all other fees incident to the White offer and its acceptance, should be paid out of the Estate. No portion of these charges should, directly or indirectly, be thrown upon these petitioners or upon the amounts they are entitled to receive... 50

The receivership costs should not be paid out of the Estate. At least, no portion thereof should be thrown upon these petitioners, directly or indirectly 50

In any event, the receiver's counsel fees should not be in whole or in part any charge, directly or indirectly, against these petitioners 56

Conclusion 59

Appendix 61

AUTHORITIES CITED.

PAGE

Atlantic Trust Co. *v.* Chapman, 208 U. S. 360, 373... 56

Baker Motor Vehicle Co. *v.* Hunter, 238 Fed. 894, 898 31
Bankus Corporation, Matter of, 45 F. (2d) 907 41
Blair *v.* St. Louis, H. & K. Railroad Company, 20 Fed. 348, 349 ..... 56, 57
Booth *v.* Clark, 17 How. 322, 331 50

Central Union Trust Co. *v.* North Butte Mining Co., 26 F. (2d) 675 53
In re J. B. & J. M. Cornell Co., 186 Fed. 859 30
In re J. B. & J. M. Cornell Co., 201 Fed. 381, 387.... 30

Davis *v.* Gray, 16 Wall. 203, 218 50

Ephraim *v.* Pacific Bank, 129 Cal. 589, 62 Pac. 177... 56
Equitable Trust Co. *v.* Great Shoshone & Twin Falls Water Power Co., 245 Fed. 697; 249 Fed. 967... 51

Fryer *v.* Weakley, 261 Fed. 509, 514 55

Gay *v.* Hudson River Elec. Power Co., 184 Fed. 689, 694 30
Graselli Chemical Co. *v.* Aetna Explosives Co., 252 Fed. 456 29
Guaranty Trust Co. *v.* International Type Setting Co. (not officially reported) 29

Harkin *v.* Brundage, 276 U. S. 36, 55 .....40, 42, 53
Hawes *v.* First Nat'l Bank, 229 Fed. 51, 59 56
Howard *v.* Maxwell Motor Company, 269 Fed. 292, aff'd 275 Fed. 53 38

Kansas City Terminal Ry. Co. *v.* Central Union Trust Co., 271 U. S. 445, 454 24
Kneeland *v.* American Loan Co., 136 U. S. 89, 97.... 31

Louisville Trust Co. *v.* Louisville, New Albany & Chicago Ry. Co., 174 U. S. 674, 683, 684 24

Manhattan Rubber Mfg. Co. *v.* Lucey Mfg. Co., 5 F. (2d) 39, 43 29
May Hosiery Mills *v.* F. & W. Grant etc. Stores, 59 F. (2d) 218, 220 ..... 54, 55

PAGE

Merchants Loan & Trust Co. *v.* Chicago Rys. Co., 158 Fed. 923, 927 30
Re: Metropolitan Ry. Receivership, 208 U. S. 90.... 53
Michigan ex rel Michigan Trust Co. *v.* Haggerty, 286 U. S. 334, 345 40
Mountain States Power Co. *v.* A. L. Jordon Lumber Co., 293 Fed. 502 31
Municipal Financial Corporation *v.* Bankus Corporation, 45 F. (2d) 902, 905, 906 .....41, 42, 53

In re Northampton Portland Cement Co., 185 Fed. 542, 543 30
Northern Pacific Railway *v.* Boyd, 228 U. S. 482, 502, 506, 507, 508 .....24, 31, 32, 38
Noxon Chemical Products Co. *v.* Leckie, 39 F. (2d) 318 55

Odell *v.* H. Batterman Co., 223 Fed. 292, 297 30
Okmulgee Window Glass Co. *v.* Frink, 260 Fed. 159.. 31
Old Colony Trust Co. et al. *v.* Union Land and Cattle Co., 4 F. (2d) 449 57

Pennsylvania Steel Co. *v.* N. Y. City Ry. Co., 198 Fed. 721, 728 51
Price, Receiver *v.* United States, 269 U. S. 492 44
In re Prudential Outfitting Co. *v.* Delaware, 250 Fed. 504, 506, 507 29

Quincy etc. R. R. Co. *v.* Humphreys, 145 U. S. 82, 91-2 51

Safety Car Heating & Lighting Co. *v.* U. S. Light & Heating Co. 2 F. (2d) 384 30
In re Sale of Assets of First National Bank of Florence, 6 F. (2d) 905, 909 30
Spencer *v.* Taylor Creek Ditch Co., 194 Fed. 635, 643 56

United States *v.* Butterworth-Judson Corp., 269 U. S. 504 ..... 44, 53

In re Watts, 190 U. S. 1, 27 43
Weil *v.* Neary, 278 U. S. 160, 168 57
Wheeler *v.* Badenhausen Co., 260 Fed. 991 43

Statutes, Etc.

	PAGE
General Order in Bankruptcy XXXV	46
General Order in Bankruptcy XLII	46
General Order in Bankruptcy XLIII	46
National Bankruptcy Act Sec. 3(a)(2)	45
National Bankruptcy Act Sec. 12(a)	47
National Bankruptcy Act Sec. 12(b)	48, 49
National Bankruptcy Act Sec. 14(b)	49
National Bankruptcy Act Sec. 21(a)	47
National Bankruptcy Act Sec. 48	46
National Bankruptcy Act Sec. 60(a)	45
National Bankruptcy Act Sec. 64	47
National Bankruptcy Act Sec. 70(b)	46, 47
National Bankruptcy Act Sec. 72	46

Textbooks, Etc.

Association of the Bar of the City of New York, Year Book 1927, pp. 299, 321	43
Beach on Receivers (2nd Edition) p. 7	51
Beach on Receivers (2nd Edition) Sec. 774	56
Connecticut Bar Journal (1920-1929) p. 1	44
High on Receivers (4th Edition) p. 3	51
High on Receivers (4th Edition) Secs. 188 and 216	57
High on Receivers (4th Edition) Sec. 796	56
Yale Law Journal Vol. 19 (1910) p. 276	43, 44

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1932.

No. 8.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners
(Appellants Below)

vs.

VALERIA E. CORIELL,
Respondent
(Appellee Below)

MORRIS WHITE, INC.,
Respondent
(Appellee Below)

IRVING TRUST COMPANY, as Receiver of MORRIS WHITE, INC.,
Respondent
(Appellee Below)

MICHAEL HOLLANDER, et al., Constituting a Committee of Creditors of MORRIS WHITE, INC.,
Respondent
(Appellee Below)

BRIEF FOR PETITIONERS.

This case comes before the Court on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, issued May 16, 1932 (286 U. S. 537).

Opinions Below.

The order of the District Court forming the basis of the appeal to the Circuit Court of Appeals is printed on pages 151 to 155 of the Record. No written opinion was filed by the District Court, but it orally stated its views (R., 130-132). The opinion of the Circuit Court of Appeals (R., 165-174) is reported in 54 F. (2d) 255.

Statement of Facts.

Mr. Morris White.

On December 11, 1930 the Superintendent of Banks of the State of New York closed the doors of the Bank of United States. Morris White was a director and owned 4,000 or 5,000 of its shares (R., 120). To use his own words, he was "connected in some of the deals there and I was cleaned" (R., 120).

At the time of the bank's closing, Morris White was in the business of manufacturing handbags under the name of Morris White, Inc. (R., 86, 120). As he testified: "Morris White, Inc. is Morris White" (R., 123). While that business had been profitable, he had lost money in the stock market (R., 120, 67), and had allegedly lost $20,000,000 in outside ventures (R., 86, 131). At the time when this suit was begun, he was "dead broke", as a result apparently of what his counsel called "his over-expansion in outside interests" (R., 91), and was "not worth anything" (R., 86).

In the District Court he admitted that he personally owed Morris White, Inc. $137,729.68, representing money taken by him from it and employed in his other ventures (R., 121, 122); and that the Morris White Holding Co., Inc., which was the corporate form through which he conducted his real estate speculations owed the Morris White, Inc. over $1,700,000, likewise representing money diverted by him from it to the Holding Company (R., 122, 123). These huge sums represented in the aggregate nearly double the entire indebtedness of the Morris White, Inc. (R., 134, 135); and its insolvency was due principally to these enor-

mous diversions by White. The Morris White Holding Co. Inc. went into bankruptcy in April, 1931 (R., 78; 52 F. (2d) 499).

The Institution of the "friendly" Equity Receivership.

About the time the Bank of United States closed, White's bank creditors took possession of Morris White, Inc. under what they called an informal "friendly receivership" which lasted until April 6, 1931 (R., 74, 107, 121).

During that period the banks, under a promise to continue to finance Morris White, Inc. (R., 75, 99), had their claims paid down and took receivables as security (R., 173, 19, 49, 50, 53, 121). The receivables thus assigned reached the huge sum of $251,409.42 to secure loans of $179,116.81 (R., 134).

During this informal "friendly receivership" $750,000 was paid to certain creditors apparently in preference to other creditors (R., 74, 75), so that on April 6, 1931, there remained in the treasury of Morris White, Inc. only $5,614.60 in cash (R., 134). What creditors received that money and what other preferences sprang out of that "friendly receivership" has not thus far been adequately inquired into.

However, this "friendly" manipulation came to an end when Pfister & Vogel Leather Company, a creditor, "refused to play along" (R., 74, 75), secured a judgment for $25,036.26, issued execution on March 31, 1931 (R., 35) and found no funds (R., 41).

Instead, however, of invalidating the lien and preference of this judgment by putting the Morris White, Inc. into bankruptcy, White and the creditors conducting the informal "friendly receivership", resolved to secure a formal "friendly receivership" at the price of paying the judgment in full (R., 34). Some results would be that the preferences and priorities established during the preceding four months would not be automatically invalidated; the $750,000 paid to certain creditors during that period would not be in jeopardy of recovery for all the creditors; an effective inquiry under Sec. 21-A of the Bankruptcy Act

would be escaped; White's diversions of over $2,000,000 would avoid the harsh scrutiny of the Bankruptcy Court; and the assets of the Morris White, Inc. would (so it was supposed and planned) be readily and safely juggled over to a new White company without giving the non-assenting creditors anything but paper.

Accordingly the so-called "creditors' committee" which had been conducting the informal "friendly receivership" and which contained two representatives of the banks and three representatives of certain merchandise creditors, "planned an equity receivership" (R., 57, 75). One of the banks assigned to a convenient non-resident dummy, without value or consideration, a note of the defendant corporation for $45,000 on which there was due $27,900 (R., 4). That dummy thereupon filed, on April 6, 1931, the present bill of complaint, by Olcott, Holmes, Glass, Paul & Havens as solicitors, with Joseph Glass of that firm as counsel (R., 7). On the same day, Morris White, Inc. filed an assenting answer, and the Irving Trust Company was appointed equity receiver (R., 8). The receiver immediately retained the complainant's solicitors and counsel as its solicitors and counsel, and they have *ever since* been acting as such *both for the complainant and for the receiver* (R., 47, 165). In other words, since their client, the dummy complainant, is obviously the mere nominee of the said "creditors' committee", it must fairly be assumed that these solicitors and counsel were the choice of that committee when it "planned an equity receivership" (R., 57, 75), and that in continuing to represent the complainant they are continuing to represent the interests for whom she is a dummy.

The Bill of Complaint.

The dummy complainant was at most a simple contract creditor, without judgment or collateral.

The complaint alleged that "the business of the defendant and its subsidiary corporations has been conducted successfully and prosperously since 1926, and was a growing

and profitable business up to about a year ago" since which time "a very substantial part of defendant's assets has become tied up in its inventories" (R., 2); that the assets of the defendant Morris White, Inc. exceeded its liabilities by $3,000,000 (R., 2); that the liabilities, however, were "in excess of its quick assets available for payment of same" (R., 2); that "the large majority of the creditors of defendant in number and amount expressed their willingness to extend the time of payment of the indebtedness" (R., 2); but that one of the creditors obtained a judgment against Morris White, Inc. in the sum of approximately $25,000 (R., 2); that other creditors were pressing their claims; that unless a receiver were at once appointed Morris White, Inc. would be subjected to a multiplicity of suits, its assets would be dissipated, some creditors would secure preferences over others and the defendant's business would be destroyed (R., 3).

The complaint then went on to point out that at a forced sale the value of the defendant's assets would be greatly impaired, and that if the properties of the defendant could be preserved and administered by a court of equity and the business of the defendant continued by a receiver, the value of the assets would be maintained and the rights of the creditors protected (R., 4).

Such was the avowed purpose of the receivership. But the real purpose of Morris White and his associates (as we believe this record abundantly shows) was (a) to carry out a scheme, with the sanction of the equity court, whereby, without putting Morris White, Inc. into bankruptcy, Morris White might retain the assets of that corporation and pay its creditors in paper; (b) to prevent an examination of preceding preferential payments and arrangements (R., 74, 75); and (c) to exempt Morris White and his associates and the books of his various corporate enterprises from a searching examination in bankruptcy.

Certain of the allegations in the complaint were shockingly untrue and uncandid and must, we submit, have been known by Morris White to be such at the time that he signed

and swore to the answer by which all of the allegations of the complaint were admitted (R., 8).

Thus, it was not disclosed in the complaint that the defendant had only about $5,000 in cash (R., 134); or that it owed for federal and state taxes over $158,000 (R., 101); or that, among the book "assets" alleged to be "in excess of $4,000,000" (R., 2), there were included claims for $2,777,714.89 (R., 134) against White's other companies, principally the aforesaid claim for $137,729.68 against himself (who is now admitted to have been "dead broke", R., 86, 91, 121-2), and the aforesaid claim for over $1,700,000 against Morris White Holding Co., Inc. (which even then was going into bankruptcy, R., 78, 52 F. (2d) 499).

While the bill of complaint stated that "the books" showed assets in excess of $4,000,000, it did not state what was their actual value. As a matter of fact, the actual value was tremendously less,—as those promoting the equity receivership must have known. Thus, Mr. Glass, counsel for the complainant and the receiver, told the District Court in May, 1931, that whereas the merchandise on the books as of April 6, 1931, had a book value of $1,249,000, nevertheless it "was estimated to realize $357,000 on receiver's sales in liquidation and $717,000 on a going concern basis" (R., 62).

The Offer of Mrs. Morris White, and the So-called Reorganization Plan.

Although the professed purpose of the complaint was to carry on the business and pay the creditors in full (R., 3, 4, 77), nevertheless three weeks later, to wit, on April 29, 1931, an offer was made by Mrs. Morris White to "purchase" all of the assets of Morris White, Inc. (R., 18-32).

That offer, in its terms and effect, is rather neatly summarized in the District Court's observation that thereby Morris White has "got the capital of the creditors there for years at his disposal" (R., 89), and in the following

colloquy between the Court and counsel for Morris White, Inc. (R., 96):

> "The Court: Yes; you (White) are taking all the assets of the creditors and wiping them out, with the exception of 20 per cent of their claims and subjecting them to the hazards of the enterprise. Now, most reorganization schemes, either by way of composition or otherwise, provide for the payment of some cash to the creditors so that they get something out of it; and where the whole thing is being taken——
>
> Mr. Stern: That is impossible, in this situation."

The offer made no provision at all for any payment of cash to any creditor or for putting any cash or any new capital or new personnel into the business (R., 26, 50, 55, 66, 139). It made no provision for the payment of any money whatever to any dissenting creditor (R., 26). It proposed that the Court by mere *fiat* should wipe out the creditors (except for 20 per cent. of the indebtedness to them), and compel them all (whether willing or unwilling) to give over their capital to a new corporation under the management and control of Morris White, and, without any security, to take the gamble as to what he might do with it.

Mrs. Morris White's offer was for all the interest of Morris White, Inc. and of the receiver in the assets, business and properties of Morris White, Inc. It provided that the offerer would organize a New York corporation under the name of Morris White Handbags Corp. with an authorized capital of 10,000 shares, of which 1,000 shares were to be common without par value and to be issued for such consideration as the board of directors might deem advisable. The remaining 9,000 shares were preferred stock, of the par value of $100 per share, to be issued by the new corporation in extinguishment of 80% of the proven and allowed indebtedness to the creditors. In other words, Morris White was to have the common stock, and the creditors the preferred stock (or rather, as shown hereafter, voting trust certificates for the same).

Under this plan, the secured creditors are enabled, notwithstanding their security, to receive stock and notes for their entire claims. According to the admissions of the respondents, the banks are secured by assigned accounts receivable for about 60% of their claims (R., 173, 19, 49, 50, 53, 121, 134),—the accounts receivable so assigned being about 82% of the entire receivables (R., 90, 91, 134). Nevertheless, the White offer enables the banks to receive notes for 20% of their entire claims. Thus the banks are put in position to collect 80% of their claims whereas the unsecured creditors would at the best get only 20%.

The control of the corporation was to be in the common stock, to wit: Morris White (R., 54). To quote the offer (R., 21):

> "Except as otherwise provided by statute, and except as is expressly provided herein, the holders of the common capital stock shall have the sole and exclusive right to vote and consent for any purpose and the holders of the preferred stock shall have only such voice or vote in regard to the management of the corporation as is expressly herein granted and all other powers, express or implied, shall be held and had by the owners and holders of the common stock."

As if this all-inclusive grant of control were not sufficient, the offer expressly specified certain subjects as to which the preferred stock should not be entitled to vote (R., 56). These subjects were (R., 21, 22):

1. Increase or decrease of the common capital stock of the corporation.
2. Any proceeding for the mortgaging of the property of the new company.
3. Any proceeding for the sale of the property of the new company.
4. Any change of name.
5. The matter of voluntary dissolution.

Even the right given to the preferred stockholders in the early part of the offer "to elect two of the five directors" (R., 22, 54), was qualified in the latter part of the offer by the provision that the preferred stock should actually be put in the names of two voting trustees for a period of ten years,—one of such trustees to be designated by the members of the Creditors' Committee representing the merchandise creditors and the other to be designated by the members of the Creditors' Committee representing the bank creditors (R., 28, 85).

The voting trustees were thereupon, year by year, to elect to the board of directors, "one member of the Creditors' Committee representing the merchandise creditors" and "one member of the Creditors' Committee representing the bank creditors" (R., 29, 69).

In other words and in reality, the majority of the board of directors were to be nominated and controlled by Morris White (R., 94, 69, 113), and the minority were not even to represent the creditors *but only the Creditors' Committee,* which committee, according to its own claims, did not represent more than $589,000 out of the total indebtedness (R., 17). Counsel for Morris White, Inc. admitted that nearly $300,000 of this amount was represented by the banks (R., 57); and counsel for the Creditors' Committee stated that the Committee represented $178,000 of merchandise creditors and $262,500 of bank creditors and that the balance of the representation on the Creditors' Committee was made up of secured indebtedness (R., 72).

The offer further provided that of the three directors to be voted for by the common stock (R., 22), Morris White would be one, and that he would also be president of the new corporation (R., 22).

The preferred stock was to receive from the net profits of the corporation "as and when declared by the board of directors" non-cumulative dividends at six per cent. annually (R., 23). In the event an audit for any fiscal year

showed that there had been net operating profits earned, the board of directors was required to apply one-third thereof in the redemption or retirement of the preferred stock (R., 24). Under these provisions, the board could annually build up a reserve of nearly two-thirds of the profits for the common stock, to wit, for Morris White.

The common stock was not to be paid dividends until the preferred stock had been retired (R., 23).

The board of directors were given the exclusive right to employ the executives of the new corporation and to fix the salaries thereof; but as long as any of the notes mentioned in the offer were unpaid, such action required the concurrent vote of four of the five members of the board (R., 23, 69). In other words, by alliance with either the wing of the Creditors' Committee representing banks or the wing representing merchandise creditors, Morris White could vote such salary to himself and his nominees, as he might see fit; and, apparently, even the requirement of such a slight alliance faded out of the picture after payment of the promissory notes, the last of which matured on July 2, 1933 (R., 27). Morris White stated that he might expect a salary as high as $60,000 a year (R., 114, 115).

The notes thus referred to were to total 20% of the proven and allowed claims of creditors, and were to be in four series. The first series were to be due on January 2, 1932; the second series on July 2, 1932; the third series on January 2, 1933; and the fourth series on July 2, 1933 (R., 27). They were all to be without interest and without security (R., 27).

The receiver's administration expenses, including the fees of itself and its counsel, were estimated at about $50,000 (R., 51, 101).

Counsel for the Creditors' Committee was to receive "a counsel fee in an amount to be agreed upon between him and the new corporation" (R., 26, 49).

The indebtedness of $158,500 in the form of taxes to the United States Government and the State of New York

(R., 101, 70, 95), was to be assumed by the new corporation (R., 26).

The Opposition to the White Offer.

At the hearings on May 26 and May 27, 1931 on the return of the order to show cause, the following creditors opposed:

1. National Surety Company, American Credit Indemnity Company and London Guaranty & Accident Company, Ltd. These companies are the insurers of certain accounts owed by Morris White, Inc. as to which claims have been filed against them aggregating $92,138.15; and the London Guaranty & Accident Company, Ltd. was on May 26 and May 27, 1931, by payment to Rex Novelty Works, a direct creditor of Morris White, Inc. in the sum of $19,329.42 (R., 136, 137, 52).

2. Hermann Loewenstein, a direct creditor in the sum of $5,600. This creditor was represented at the hearings by Mr. John S. Wise of the firm of Baldwin, Hutchins & Todd (R., 60).

3. G. Levor & Co. Inc., a direct creditor in the sum of $4,500 on a judgment (R., 111). This creditor was represented at the hearings by Mr. Raymond O'Connell of the firm of O'Connell & Butler (R., 65).

So that the total of the claims in opposition was $117,077.57, or nearly as much as the unsecured merchandise creditors represented on the Committee (R., 72). It must be borne in mind that none of the creditors' claims have yet been proven.

The total number of creditors was stated by White's counsel to be 245 (R., 91). The receiver's counsel stated that the Creditors' Committee approving the offer represented about $589,000 out of the total amount of claims (R., 51). Mr. Wise, on the other hand, in opposing the offer said (R., 66):

> "It (this Creditors' Committee) does not represent either the majority in amount nor in number, as

I understand it; and I have been at some pains to find that out."

Certainly no list or itemized statement of the creditors represented by the Committee or of the creditors approving the offer, was furnished, either by the receiver or by anyone else at any stage of the proceedings in the District Court.

The Proceedings at the Hearings on the Offer.

On May 26, 1931, Mr. Tuttle (of counsel for the dissenting creditors) opposed the offer on the following grounds:

1. The situation discloses a bankruptcy "which is nearly 100%" (R., 54).

2. The "channel of administration" should be in bankruptcy and not through an equity receivership (R., 54).

3. In view of all the circumstances, including the enormous diversions by Morris White of immense sums of money from the corporation, the creditors were entitled to that kind of examination which could only be had under Section 21A of the Bankruptcy Act (R., 54, 58, 106).

4. There had been presented no statement upon which any intelligent judgment could be based,—no appraisal of the assets, as distinct from merely bookkeeping entries at the time of the appointment of the receiver; no estimate of expenses; no proof as to the amount to be absorbed by the expenses of the receivership and the fees of the receiver and its counsel and the counsel for the Creditors' Committee; no inventory of assets; no proof as to where capital was coming from to operate the new company or on what terms such capital could be raised; no proof that the new company could operate at a profit, or even meet its liability on the notes; and no assurance as to what use Morris White would

make of the enormous power guaranteed to him (R., 52-55).

On May 27, 1931, Mr. Tuttle verified (R., 137) an affidavit which is part of the record (R., 135-137). Leave to file it was granted during the argument that day in the District Court (R., 63, 64). Attached to it was the affidavit of T. M. Garrison, assistant secretary of the National Surety Company, verified May 26, 1931, which set forth certain grounds of opposition (R., 137-141). Mr. Tuttle's affidavit added (R., 137):

> "In addition, deponent respectfully submits that the moving papers and the statements as to the financial condition of Morris White, Inc., and as to this action made upon the argument upon the return of the order to show cause, *show that this case is not one justifying an equity receivership at all; and that the court has no jurisdiction to proceed in equity.*"

The prayer of Mr. Tuttle's affidavit was that the offer be rejected; and (R., 137):

> "*Deponent further prays that the complaint herein be dismissed and the receivership vacated.*"

No Public Sale, and Competition Impossible.

What the White offer contemplated was really not "a sale" at all. Nothing was paid to either Morris White, Inc. or the creditors. No security even was given. No new money or new assets were provided (R., 26, 50).

On the contrary, it was the creditors who paid. They paid by the surrender of 80 per cent. of all their claims. They were made to buy the privilege of having Morris White, at a salary of $60,000 a year (R., 114), take all the assets of the creditors and assume control, notwithstanding that by a conversion of nearly $2,000,000 of their money to other personal ventures of his own he had brought the enterprise to complete insolvency (R., 121, 122).

But even viewing the transaction as a "sale", it was a private sale to the insolvent White and substantially on his own terms.

In point of fact, this transaction was in reality a composition in bankruptcy (National Bank. Act, Sec. 12). But the rigid requirements of a composition in bankruptcy were not complied with, e. g., that the bankrupt be examined in open court before he can have terms of composition considered, that he file a schedule of his property and a list of his creditors, that it must appear to the Court that the composition is for the best interest of the creditors, that the "bankrupt has not been guilty of any of the acts or failed to perform any of the duties, which would be a bar to his discharge," that the offer and its acceptance "are in good faith and have not been made or procured * * * by any means, promises or acts herein forbidden."

No public offering—no competition—was provided for, or under the circumstances, possible.

It is true that the order to show cause which brought the White "offer" before the Court on two weeks' notice, stated that any other offer would be considered (R., 16). But there was nothing on which anyone but Morris White could make an offer. The record discloses no inventory, no appraisal, no enumeration of claims, and no report by the receiver (R., 138, 141, 123). No date had even been fixed for the filing of claims (R., 139).

While the petition of the receiver presenting the offer set forth the mere total of the liabilities as ascertained by certified accountants (R., 32), it neither annexed nor set forth any statement whatever concerning the assets. It presented no inventory or appraisal,—not even a balance sheet or a summary of book values.

It is true that on the second day of the hearings (May 27, 1931), the counsel for the so-called Creditors' Committee presented a condensed statement of assets and liabilities (R., 61, 134) prepared by accountants as a summary *of the books* as of April 6, 1931, the day this action was

commenced (R., 134). But no one claimed that this statement of book amounts had any relation whatever to reality, —indeed, everyone conceded that it did not (R., 62, 90, 91, 95, 100, 101, 118, 119).

Even the figures of the receiver's counsel which he offered on May 27, 1931 as tending to show that the new corporation could function, were admittedly prepared by him "last night" (R., 100).

The Actual Picture was one of Bankruptcy and not of Equity.

At the time when the offer was made, Morris White, Inc. was insolvent within the meaning of the Bankruptcy Act. The roseate picture drawn by the complaint of a corporation needing only temporary assistance by a court of equity was wholly false. The cash on hand on April 6, 1931, when the complaint was filed and the temporary receiver was appointed, was only $5,600 (R., 53, 134), whereas the total liabilities, as shown upon its books, were $1,072,000 (R., 32, 52, 135).

Morris White, Inc. had "not a dollar" of orders on hand (R., 102) and the market was constantly falling (R., 51). White himself was bankrupt and his other company, Morris White Holding Co., Inc. was bankrupt (R., 86, 78, 118).

In other words, the actual picture was one of insolvency, presenting a typical case for the Bankruptcy Court and for a rigid investigation under Sec. 21-A.

In keeping with this picture, no rehabilitation of the debtor corporation was possible or was attempted. The opposite course was taken. Eighty per cent of its indebtedness to its creditors was wiped out by mere *fiat* of the court; the remaining twenty per cent was transferred to and assumed by another corporation which had no assets of its own and which received no new capital from any source. *Morris White, Inc., instead of being revived, was killed.*

No Real or Competent Proof before the District Court justifying the Acceptance of the White Offer.

All that was really before the District Court, on the part of the proponents of the offer, was *talk* and lots of it,—chiefly a well organized claque for Morris White. They filled the air with hearsay assertions, opinions, guesses and prophecies (R., 66-70, 103, 104, 108, 119); but when it came right down to "brass tacks", they did not even give the court a list of the claims alleged to be represented by the Creditors' Committee, notwithstanding that the opposing counsel challenged them to show that the Committee represented a majority either in number or amount, and asserted the contrary (R., 66).

The only *affidavits* submitted were submitted by opposing counsel (R., 135-137, 138-141). The only demands for legal proof and for an examination came from opposing counsel (R., 54, 71, 66); and these demands were opposed on the specious but significant assertion that a delay of even twenty-four hours would be prejudicial because of the alleged "seasonal" character of the business (R., 116, 118, 38, 63).

The only document submitted by the proponents of the offer was a so-called "Statement of Assets and Liabilities", prepared as of April 6, 1931, the day this suit was commenced and the receiver was appointed (R., 134). But this document was not proven in any way; it was simply made the subject of assertion by receiver's counsel and by others favoring the offer. The document itself was a mere summary of book entries. No one claimed that it portrayed in any way the actual financial condition of the Company (R., 52). Counsel for the receiver and for the so-called Creditors' Committee spoke of alleged appraisals on a going concern basis or on liquidation basis; and these in each case were much smaller than those in the said Statement (R., 61, 62, 101, 118, 119).

The receiver's counsel in expressing an opinion concerning the then present asset position of the company said (R., 101):

> "That would make a total asset position, without taking any cognizance of the miscellaneous frozen assets, intercorporate claims and so forth, of $583,-500."

as against $1,552,740.34 (R., 134) for "current assets" on the said so-called Statement of Assets and Liabilities!

Apparently, as intimated above by receiver's counsel, no one considered as of any substantial value the so-called "other assets" (totaling $2,563,510.70) summarized on the said Statement. Part of such "other assets" is a note for $1,700,000 (R., 78, 122, 61, 71, 78) made by the Morris White Holding Co., Inc., now in bankruptcy (R., 78, 52 F. (2d) 499).

The Action of the District Court on the Offer.

At the close of the hearing on May 27, 1931, the Court decided to accept the offer but granted to "each one of the opponents here an exception to my ruling" (R., 133).

The District Court imposed upon the offer the following modifications:

1. That the dividends on the preferred stock should be cumulative, beginning with the dividends payable for the semi-annual period commencing January 1, 1934 (R., 152).

2. All allowances for services in this proceeding and all fees incident to the offer and its acceptance, payable out of the estate, should be subject to the approval of the court (R., 152).

3. That Morris White file with the court a stipulation that for a period of three years he will render exclusive services to the new corporation, and that he will not directly or indirectly engage in a competing business except that he shall be free to devote his time and attention to "such realty enterprises as he may now have an interest in" (R., 152-3).

In making its decision the District Court went so far as to refuse counsel for the objecting creditors a single day's adjournment for the purpose of thoroughly examining Morris White and his associates, with their books and records, although counsel for the objecting creditors was actually engaged in the trial of an extended criminal case in which he was then about to put his client, one of the defendants, on the witness stand (R., 58, 63, 72, 106, 112, 115, 116, 117, 123).

The objection to the adjournment of a day was placed upon the ground that "every day's delay is very serious" (R., 118); and yet, although the District Court summarily disposed of this matter on May 27, 1931 (R., 130), the order confirming the so-called sale was not entered until June 15, 1931 (R., 151-155).

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals reversed only in part the order of the District Court with an opinion per Manton, C. J., 54 F. (2d) 255. The fundamental propositions of this opinion were:

1. There was no power in the District Court to compel any contract creditor to accept, in extinguishment of his claim, the preferred stock and unsecured obligations of a new industrial corporation, without the payment of any cash; and

2. The petitioners were entitled to receive in cash their proportionate share of the proceeds of a conventional sale of the property; but

3. The rights of petitioners can be satisfied by giving them in cash, in lieu of a sale, an aliquot share of what would have been realized if the property of Morris White, Inc. had been sold at public auction, or, at their option, by giving them in cash an aliquot share of the value of the preferred stock and notes offered to them by the so-called reorganization plan and as of its date.

Assignment of Errors.

Petitioners submit that the Court below erred in the following particulars:

1. In holding that the claims of the petitioners herein could be determined by estimating the amount of the highest bid which the property of the defendant corporation would have brought had it been publicly sold on June 15, 1931.

2. In failing to hold that the petitioners herein, as creditors objecting to the "reorganization" plan, were entitled to have the amounts due to them determined and paid upon an actual sale of the property of the defendant corporation.

3. In failing to hold that petitioners were entitled to have their rights administered and safeguarded in the manner in which they would have been under the Bankruptcy Act, and as of April 6, 1931.

4. In failing to hold that no part of the receivership costs or obligations should be charged against the estate of the defendant corporation before petitioners were paid the respective amounts due to them.

5. In failing to hold that no part of the attorneys' fees of any of the respondents herein should be paid out of the property of the defendant corporation before the petitioners were paid the respective amounts due to them.

6. In failing to hold that none of the property transferred to The Morris White Handbags Corp. should be subject to debts incurred by that corporation until the petitioners herein are paid in full.

FIRST POINT.

The Court below erred in holding that petitioners' rights could be fully safeguarded by an estimate of what would have been realized upon a sale, rather than by a sale itself.

I.

The decision of the Circuit Court of Appeals comes, for all practical purposes, to the same thing as the decision of the District Court.

The power exercised by the Circuit Court of Appeals is without precedent. It is the first decision of its kind.

Under that decision, a group of creditors may, through a court of equity, do what they could not possibly do under the Bankruptcy Act nor under the equity practice as it has heretofore been understood, to wit: dispense altogether with any sale, public or private; cause the assets to be transferred to a new corporation organized by themselves without new capital, money or assets; and, without making any payment, throw upon the other creditors the duty and expense of employing lawyers and accountants in undertaking to make impossible proof, namely, the amount which the assets would have realized if sold at a theoretical public sale held six months previously under terms of sale which had never been fixed, with a manner of advertising now undeterminable, and with circumstances of bidding now unknowable.

The burden and expense thus thrust upon minority creditors is practically prohibitive. Even if they undertake it, the proposition which they are required to establish can, at best, be a mere guess and undeterminable by any practical standards,—a proposition, moreover, as to which they will almost certainly be overwhelmed by a flood of interested or inspired testimony (entirely safe and easy)

from the officers and favored creditors to the effect that a public sale would have yielded little or nothing

Why should those who desire to go on with the business be entitled to place this burdensome penalty and this incalculable risk upon those who do not desire to have their capital compulsorily confiscated (without payment) for a new corporation and a new hazard over which they have no control? Why should they be permitted to deprive non-assenting creditors of that actual demonstration and proof which the conventional sale affords?

If a group of creditors desires to transfer all the assets of a purely private enterprise to a new corporation, why should they not be required to buy in the usual manner and at public sale and thus provide the capital for and take the risk of their own speculation, without the right of extorting a compulsory contribution from others or putting others to the burden, expense and delay of an impossible solution of an abstract conundrum? If such a result cannot be accomplished out of court, by what magic, in case of a purely private enterprise, can it be accomplished in court?

Dispensing with a public sale was in no sense a necessity for the assenting creditors in the present case and cannot be a necessity in any case. They were entirely free to organize their own corporation and to bid at the sale. If the property sells for little or nothing, they are advantaged. If it sells for a great deal, the non-assenting creditors are the more protected in their enjoyment of their contract rights. In either event, the law has proceeded with certainty, in accordance with the best evidence, and with fairness to all.

The difference between the decision of the Court of Appeals and the decision of the District Court is theoretically large but practically none at all. The difficulties to which the former subjects the non-assenting creditors is substantially equivalent to the exclusion which the latter imposed.

II.

The decision of the Circuit Court of Appeals is too indefinite and is impossible of performance. It substitutes guesswork for reality as a measure of rights.

(1) How can any Special Master ascertain "the value of the assets as if sold at public sale" under conditions which have long since passed and which cannot be reconstructed?

In the present case, there was at no time either an inventory, or a verified and adequate accountants' statement, or an appraisal. The failure of the District Court to require such protective proofs before proceeding to authorize the transfer, was one of the non-assenting creditors' chief complaints (R., 52, 32, 62, 90, 91, 95, 100, 101, 118, 119). Nor did the Circuit Court of Appeals have before it either inventory, verified accountants' statement or appraisal.

Why should the creditors, who properly opposed their compulsory inclusion in the paper reorganization, be now left without practical relief because of the erroneous ruling, since reversed, by which they were prejudiced?

In the interval of time since June 15, 1931, the new corporation undoubtedly consumed or sold much of the merchandise transferred to it by the decree of that date. How can an inventory of the property then transferred now be prepared? How can it now be told precisely what property was available for sale on that date? How can these petitioners, who had no connection with the business at that time, now meet the self-interested testimony which would be offered by White and the assenting group as to the identity, nature and value of the property then on hand?

Moreover, is the Special Master to determine the value of each asset at cost less depreciation? Is he to take as the standard the market value? Is he to consider what would be paid by a going business or by a junk dealer? How is he to determine how many bidders would come forward in response to advertisement, the extent and manner of

which cannot now be known? How is he to know how much the sale would have been enhanced by a proper inventory, appraisal and adequate accountants' statement which actually never existed? How could he know what would have influenced the bidders, or how good, bad or indifferent their competition would have been?

What the fair value of the property was on June 15, 1931, would (if there had been a proper inventory) be susceptible of proof; but what it would then have realized at a public sale is not now susceptible of proof. The consequences should fall, not upon those who stood upon their just rights, but upon those who illegally created the situation.

The assets of Morris White, Inc., though nominally in the custody of the Receiver, were actually in the control of Morris White and his friends. Through counsel representing adverse interests, they could claim that the assets were worth more or little as it suited their purpose. As late as May, 1932, when they filed their brief in rejoinder to petitioners' brief in this Court, respondents claimed (p. 5) that the assets of the corporation were in excess of $4,116,000, while at the same time the Morris White Handbags Corporation had already gone into bankruptcy. During the proceedings in the District Court, respondents maintained that the reorganization plan in the matter of Morris White Holding Company would yield to the creditors in this case $1,000,000 out of the $1,700,000 debt owed to the defendant, although the Holding Company was even then in bankruptcy (R., 78). That claim was made in order to influence the court to accept the offer of Mrs. Morris White.

One can go through the record in this case and trace the three sets of figures representing the assets of Morris White, Inc., i. e. the accountant's figures, the figures on a going concern basis and the figures on a forced sale basis, and see how differently the assets of the corporation could be and were represented depending on the argument urged

before the court. Under such circumstances, a fair estimate of the value of the property could hardly be obtained.

(2) There also is an insurmountable legal difficulty: *If the aliquot interests in the property estimated are less than the amount of the claims, by what right does the sole stockholder of the defendant corporation retain this enormous interest in the property?*

The decree of the court below is in conflict with the "fixed principle" laid down by this Court in *Northern Pacific Railway* v. *Boyd*, 228 U. S. 482, where this Court said (pp. 507-8):

> "The invalidity of the sale flowed from the character of the reorganization agreement regardless of the value of the property, for in cases like this, the question must be decided according to a *fixed principle*, not leaving the rights of the creditors to depend upon the balancing of evidence as to whether, on the day of sale the property was insufficient to pay prior incumbrances. * * * If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, *for dividends or only for purposes of control.* In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever." (Italics are ours).

See also:

Kansas City Terminal Ry. Co. v. *Central Union Trust Co.*, 271 U. S. 445, 454

Louisville Trust Co. v. *Louisville, New Albany & Chicago Ry. Co.*, 174 U. S. 674, 683-4.

In the case at bar, upon an estimate of the property, which as a matter of fact would leave little or nothing to the dissenting creditors, the sole stockholder has been allowed to remain in full possession and control of all the property of the corporation.

SECOND POINT.

The Court below erred in failing to hold that the property of the defendant corporation must be sold to satisfy the claims of the creditors; and erred in reversing only in part the decree of June 15th, 1931.

I.

The Decree of June 15, 1931 rested on no known Principles of Law.

With the greatest respect for the District Court, we know of no other instance where a court of equity has supposed that the appointment of a temporary receiver has suddenly clothed the Chancellor with full plenary powers of economic dictatorship in the case of a private industrial corporation.

The District Court, by its decree, undertook to exercise powers which under our constitutional system of free government have never before been exercised by any department or official,—the power to abrogate and annul accrued contractual obligations, to force unwilling parties into a new contract, to substitute stock certificates and promissory notes for legal tender, to compel business men against their will to become associates and partners in new ventures, to order owners of property to put it under the control and management of a man whom (rightly or wrongly) they regard as having been proven to be dishonest and incompetent, and to confiscate the property of minority creditors to further the purposes and interests of the majority.

The decree of June 15, 1931, we respectfully submit, was equity jurisdiction run wild. In our opinion, it perfectly typifies the "benevolent despotism" which is the inevitable result of the present monstrous growth of "friendly equity receiverships", and which the prior warnings of this Court seem to have been insufficient to check.

Such a result, we submit, must rest upon a sort of judicial magic and not upon ordered and established principles of law. A private industrial corporation, embarrassed for ready cash to meet current demands, has but to sue itself in equity through the good offices of a dummy "friendly" creditor. Then presto! All legal principles and the rights of contract and property and the freedom of individuals vanish into thin air, and their room is taken by an Authority heretofore unknown to the law—a legal anomaly, the Absolute Autocrat,—who rearranges all the rights of persons, contracts and property in accordance with his say-so as to what is "fair", and then compels every one on pain of contempt or outlawry to accept his "plan" of economic salvation.

Whence the sanction for any such Authority? Certainly the man who loans money or credit to a private industrial corporation does not thereby affect with a public interest his right to repayment according to his contract, or dedicate it to the public service. Much less does he confer upon other creditors of such a corporation a proprietary interest in his rights or a super-sovereignty over his own decisions concerning those rights. Least of all does he confer any authority upon the court to liquidate him out of the venture of his own selection by putting him into another, the hazards of which he feels himself better qualified than the judge to gauge, and the controlling personalities in which he profoundly dislikes and distrusts.

It may be (and it may not be) that in case of a quasi-public corporation exercising public franchises in aid of a necessary public service, a court of equity can find in the public nature of the enterprise a sanction not conceivable in the case of a private industrial concern. One who loans money or credit to a quasi-public corporation may possibly be said to affect it with a public interest and to subject it in part to the public's proprietary interest in the enterprise as represented by the public franchises. In such case a court of equity might possibly find an excuse as a guardian

of the public right to require private right to pursue certain settled standards in the interest of the public good.

Furthermore, a quasi-public corporation (such as a railroad) is outside the Bankruptcy Law, and therefore as to it insolvency administration must be in equity or be nowhere. On the other hand, private industrial corporations are expressly included within the exclusive insolvency administration provided by the Bankruptcy Law; and the interposition of equity, except to aid in the execution of judgments not voidable in bankruptcy, is usurpation and in effect a nullification of the Bankruptcy Law.

If the decree of June 15, 1931 is legally possible in the case of a private industrial corporation, why is it not also possible in the case of a private individual? Why does it not open the door for every debtor, corporate or individual, through the easy subterfuge of a "friendly equity receivership" to secure a nullification of his debts, and to compel his creditors to take in payment such promissory notes and stock certificates as some equity judge may think "fair" and for "the good of all concerned"? If so, what becomes of the Bankruptcy Law, with its carefully balanced safeguards and procedures?

If private property cannot be taken for a public use without compensation, *a fortiori* it cannot be taken for the private use of someone else, or for a compensation which is not legal tender.

The order of the District Court, if regarded as giving the creditors "payment" (to use the euphemism of the White offer, R., 18), does so by compelling them to accept paper not legal tender under the statutes of the United States.

On the other hand, if the decree of June 15, 1931 does not "pay" the debts to the extent of the insolvent's financial ability, then it asserts the power to wipe out the contracts by which credit was extended to the corporation, and to tell individuals what stocks they must buy, what new commercial hazards they must undertake, and with what co-

adventurers they must embark. It treats the assets of an insolvent commercial corporation as a trust fund for the benefit of the debtor instead of the creditors.

The doctrine that a court of equity is a court of conscience does not mean that it is a court of general benevolence, or a censor of morals, or a general guardian of business men.

As to public policy, in the long run it is, we submit, more to the interest of the public and the parties to permit business men to make their own contracts by the usual process of give and take, than to have their contracts written for them by paternalistic judges however competent and well intentioned they may be.

Adoption of the principles of the order of the District Court would, in the last analysis, mean that the security behind an extension of open credit is the unpredictable judgment of some judge in equity. Business men will not advance such credit to private commercial corporations if they feel that they are not able to contract that, when disaster comes, they may decide for themselves whether to take their proportionate share in money or embark their capital in some new enterprise. Certainly lawyers would, in such event, be obliged to confess their inability to advise their clients as to either their "rights" or their just expectations in law. They would have to say that even as to contract and property rights the law is not a science but merely what *a judge may think* "fair and equitable" (R. 152).

II.

The decisions deny the power exercised in the decree of June 15, 1931.

No precedent whatever can be found for that decree—certainly not in the case of a private commercial corporation, possessing no public service franchises and affected with no public interest. The decisions are all to the very contrary.

In *Manhattan Rubber Mfg. Co.* v. *Lucey Mfg. Co.*, 5 F. (2d) 39, Judge Learned Hand (refusing to follow *Graselli Chemical Co.* v. *Aetna Explosives Co.*, 252 Fed. 456), said (p. 43):

> "They (creditors' bills in equity) are as much *limited by law* as any others, and there is in my judgment no warrant either in principle or policy, for asserting that, once a receiver is appointed, the court takes on the part of *a benevolent despot.*"

In *In re Prudential Outfitting Co.* v. *Delaware*, 250 Fed. 504, Judge Learned Hand said (pp. 506-7):

> "Upon principle the question is clear. Bankruptcy does not change the character of the creditors' claims, which are measured by, and collectible in, money. It does insure equality of distribution and modify the creditors' remedies, but there is no shadow of warrant for the idea that an interest in property may be forcibly imposed upon them in place of money. They have the right, as they had before, to have those assets converted into money, collectively instead of separately, and nothing can invade or impair that right, unless it be by statute. * * *
>
> "The conventional form of reorganization does justice to dissentient creditors, and all efforts to avoid or evade it are illegal. Under it a new corporation is formed by those creditors who wish to join the plan, and who assign their claims to it or to their committee. This corporation or committee may then make *a cash bid*, which it may in part pay by allowing a proportionate credit upon the assigned claims. *The dissenting creditors must be paid in cash their own proportion of the bid, which is their inviolate right.*"

In *Guaranty Trust Co.* v. *International Type Setting Co.*, U. S. D. C., Southern District of New York, February 1916 (not officially reported), Judge Hough, in the case of an industrial corporation, said:

> "There is a good deal to be said in favor of a new scheme of law which would in some way confer

> upon an impartial and disinterested tribunal the entire supervision of corporate reorganization. * * * *But no such system of legal procedure now exists.*"

In *Safety Car Heating & Lighting Co.* v. *U. S. Light & Heating Co.*, 2 F. (2d) 384, the reorganization was of an industrial company. Judge Hazel held (to quote the first headnote):

> "A reorganization of an insolvent corporation, whether by agreement between stockholders and creditors or through court procedure, *cannot affect nonassenting creditors*, and its assets in the hands of the new company remain subject to a lien for their claims."

In *In re Northampton Portland Cement Co.*, 185 Fed. 542, Judge J. B. McPherson said (p. 543):

> "There is no inherent power in the court to compel minority creditors to give up legal property rights, and in their stead to accept securities and incur liabilities which have already been declined. * * * They (reorganizations of this kind) may be desirable; but the creditors must determine that for themselves. The usual course of administration may be certain to result in heavy loss; but the court must pursue that course unless the act has authorized the use of exceptional means."

To the same effect are:

In re J. B. & J. M. Cornell Co., 186 Fed. 859;
In re J. B. & J. M. Cornell Co., 201 Fed. 381, 387;
In re Sale of Assets of First National Bank of Florence, 6 F. (2nd) 905, 909;
Merchants' Loan & Trust Co. v. *Chicago Rys. Co.*, 158 Fed. 923, 927;
Gay v. *Hudson River Elec. Power Co.*, 184 Fed. (C. C. A. 2nd Cir.) 689, 694;
Odell v. *H. Batterman Co.*, 223 Fed. (C. C. A. 2nd Cir.) 292, 297;

Okmulgee Window Glass Co. v. *Frink,* 260 Fed. (C. C. A. 8th Cir.) 159;
Baker Motor Vehicle Co. v. *Hunter,* 238 Fed. (C. C. A. 2nd Cir.) 894, 898;
Mountain States Power Co. v. *A. L. Jordan Lumber Co.,* 293 Fed. (C. C. A. 9th Cir.) 502;
Kneeland v. *American Loan Co.,* 136 U. S. 89, 97.

III.

The Boyd case, 228 U. S. 482.

(1) The *decision* in the *Boyd* case (which concerned a public service corporation and not a private industrial corporation) is a square authority against the decree of June 15, 1931. The decision settled three principles of law:

> 1. "As between the parties and the public generally, the sale was valid. *As against creditors, it was a mere form.* Though the Northern Pacific Railroad was divested of the legal title, the old stockholders were still owners of the same railroad, encumbered by the same debts. The circumlocution did not better their title against Boyd as a non-assenting creditor. They had changed the name but not the relation. The property in the hands of the former owners, under a new charter, was as much subject to any existing liability as that of a defendant who buys his own property at a tax sale" (pp. 506, 507).
>
> 2. "The invalidity of the sale flowed from the character of the reorganization agreement regardless of the value of the property, for in cases like this, the question must be decided *according to a fixed principle,* not leaving the rights of the creditors to depend upon the balancing of evidence as to whether, on the day of sale the property was insufficient to pay prior encumbrances" (p. 507).
>
> 3. "Even in the absence of fraud, any device, whether by private contract or under judicial sale, whereby stockholders are preferred to creditors, is invalid" (p. 482).

The decree of June 15, 1931, violates these three principles. The so-called sale "was a mere form". It slightly "changed the name but not the relation". The "old stockholder" (White) still remained owner of the assets and was confirmed and continued as such. The creditors, so far from being paid or preferred, had their claims forcibly cancelled to the extent of 80% and their capital subjected to a forced levy.

(2) On the other hand, the *dictum* in the *Boyd* case relative to the consequences to an unsecured creditor if he declines to participate in a "fair" reorganization, lends no support to the decree of June 15, 1931, and in any event has no application to the case of a private industrial corporation.

This *dictum* does not hold that the dissenting creditors are not entitled to a conventional sale upon public notice with full inventory and advertisement. It was written in the case of a public service corporation, and merely says that where there has been such a sale, the dissenting creditors may, nevertheless, not follow the assets where the reorganization plan provided for obtaining new money and made a fair and equitable offer to the creditors. In the present case there was no reorganization plan in any such sense and certainly there was no such sale. The *Boyd* case describes the sale then before the court as one made "at public outcry" (p. 507).

THIRD POINT.

The Circuit Court of Appeals also erred in not pursuing the logic of its own decision and in not adjudicating that the petitioners were entitled to follow the assets and secure from them a full payment of their claims and not merely an aliquot share of what might possibly have been realized at a theoretical auction sale held six months previous.

(1) We attach to this brief as an appendix the order made by the District Court under date of February 2nd, 1932, on the mandate of the Circuit Court of Appeals. This Court will see therefrom that all that has been allowed these petitioners is an aliquot share of some estimate by a special master as to what the assets of the Morris White, Inc. would have brought at public auction on June 15, 1931, after deducting from such estimated sum

> (1) the costs and obligations of the Receiver up to June 15, 1931;
>
> (2) the costs of the appeal to the Circuit Court of Appeals;
>
> (3) an estimate of the cost of a sale of the assets as of June 15, 1931, and
>
> (4) the claims of the United States and the State of New York for taxes.

In other words, the District Court ordered that the hypothetical proceeds of a hypothetical sale be estimated and that certain deductions be made therefrom, and left it entirely problematical whether as a result the petitioners would be paid anything at all.

In addition, the probability of these petitioners receiving nothing was vastly increased by the provision of the said order that those persons who after June 15, 1931, had, or might, become creditors of the Morris White Handbags Corp. in the regular course of business should "be entitled

to priority of payment out of the assets of The Morris White Handbags Corp. other than such assets as were transferred to the said The Morris White Handbags Corp. pursuant to said order dated June 15, 1931." The effect of this order was that if the whole or major portion of the merchandise of Morris White, Inc. were on and after June 15, 1931, sold or used up in the current business of the Morris White Handbags Corp., then the new creditors of the latter would have priority in its assets; and such priority would render substantially valueless the lien given by the said order to these petitioners for the payment of their aliquot share in the proceeds of the hypothetical sale.

(2) We respectfully submit that no such destructive limitations on the rights of these petitioners is permissible. Since, under the decision of the Circuit Court of Appeals the so-called White Plan is not in any way binding upon these petitioners, these petitioners as creditors of the Morris White, Inc. are entitled to pursue its assets wherever they may be found and are entitled to payment from the said assets or from any other property (cash or merchandise) which was substituted for them. The fact that these petitioners did not assent to the transfer of the assets of the Morris White, Inc. to The Morris White Handbags Corp. and did not assent to the decree of June 15, 1931, was a matter of public record and of public notice and knowledge; and all persons who undertook thereafter to become creditors of The Morris White Handbags Corp. had notice or were chargeable with notice of the claims of these petitioners and should have been deemed to have taken the risk of being held to have acted in subordination thereto.

The creditors of the Handbags Corp. could have no greater right in the assets of the Morris White Inc., or in the proceeds of such assets than the Handbags Corp. itself held; and the Handbags Corp. took those assets (for which it paid nothing to the Morris White, Inc.) and held them and any proceeds into which they were converted subject to claims of these petitioners as creditors of Morris White, Inc.

The Morris White Handbags Corp. was in no sense a purchaser for value. It paid nothing to the Morris White, Inc. It stripped the latter of all its assets without substituting any money, any legal tender, or indeed any thing at all, in their place.

The decree of June 15, 1931 ("reversed" by the Circuit Court of Appeals) attempted to cut off altogether the rights of these petitioners as creditors of the Morris White, Inc. to be paid out of its assets wherever they might be found (or out of the proceeds of the sales thereof in due course and for value) by interposing the decree's acceptance of the so-called White Plan. Consequently, the moment it was held that that plan and its acceptance was not a legal and valid bar to the petitioners' right of recovery, then these petitioners had the right to pursue full payment of their claims from the said assets of The Morris White, Inc. and the proceeds thereof until and unless they reach the hands of a purchaser for full value and without notice.

(3) To this result none of the creditors of the Morris White, Inc., who were such on June 15, 1931, could lawfully object. In the first place, those contemporaneous creditors (or at least those represented by the creditors committee and those individually assenting to the White Plan) have voluntarily surrendered their position as creditors of The Morris White, Inc. and have voluntarily undertaken to become creditors and stockholders solely of the Morris White Handbags Corp. In consequence, their rights are now, and from the time of their assent to the said plan, have been solely in and by derivation from the Morris White Handbags Corp.; and this latter corporation took, and must be held to have taken, the assets of the Morris White, Inc. subject and in subordination to the rights of these petitioners therein as creditors of Morris White, Inc. In other words, the assenting contemporaneous creditors can have no greater claim as of June 15, 1931, in what formerly were the assets of the Morris White, Inc. than has The Morris White Handbags Corp., as to which they voluntarily elected to become creditors and stockholders in lieu of their former position as creditors of the Morris White, Inc.

In the second place, by adopting and assenting to the White Plan and by going forward therewith and effectuating the transfer of assets with knowledge and notice that these petitioners were not assenting thereto, and with notice that the transfer was, or might be judicially determined to be, invalid in law as to these petitioners, the said assenting creditors must be deemed voluntarily to have placed themselves in subordination to the just claims of these petitioners and to have taken the risk of the outcome of the appeal which these petitioners duly took and pending which they obtained a stay.

In the third place, the said assenting creditors not only elected voluntarily to become creditors of The Morris White Handbags Corp. in lieu of being creditors of the Morris White, Inc., but they *actually scaled down and cancelled eighty per cent of their claims* and took stock of The Morris White Handbags Corp. in lieu of the said eighty per cent. *In consequence, to the extent of eighty per cent of their original claims they are not now creditors either of the Morris White, Inc. or of The Morris White Handbags Corp.*

Hence, even if (contrary to our claim) the rights of these petitioners be limited to aliquot shares in some fund and do not extend so far as to permit pursuing the assets for payment in full, then nevertheless such aliquot shares must be computed on the basis that the assenting creditors have voluntarily taken stock and notes of the Handbags Corp. in extinguishment of their claims against the Morris White, Inc. Those assenting creditors cannot now recall their election and cancel their substituted investment, for the purpose of cutting down the proportional rights of these petitioners to payment. In other words, in a homely phrase, the assenting creditors cannot eat their cake and have it too.

The Circuit Court of Appeals therefore clearly erred, even on its own logic, in holding that in measuring the aliquot share of these petitioners in the proceeds of a hypothetical sale as of June 15, 1931, the claims of all the June 15th creditors of the Morris White, Inc. should be

taken at one hundred per cent and should be given equality of standing with the claims of these petitioners for the purpose of cutting down the rights of the petitioners to payment and of limiting the amounts of such payments to them.

(4) The same considerations apply to the claims of the Federal government and the State government for taxes. Both these governments took what they evidently considered to be the benefits and advantages to them of the said decree of June 15, 1931, and thereby in effect became parties to the said decree; and they have not undertaken to appeal therefrom. This decree provided (R., 153) that at or before the transfer of the assets to The Morris White Handbags Corp. the latter should deliver for the benefit of the Federal and State governments an agreement to assume the taxes due from Morris White, Inc. and to consent that such taxes might be assessed against the new corporation.

The Federal and State governments elected to take advantage of these provisions for their assumed benefit; and the Federal government signed a written consent to the transfer of the assets, to the discharge and absolution of the receivers of Morris White, Inc. for all liability for taxes and to the acceptance of an agreement by The Morris White Handbags Corp. to pay the taxes (R., 155).

The record indicates that a similar consent was obtained from the State government (R., 101, 133), and the decree of June 15th itself so establishes, because in paragraph Third thereof it provides (R., 154):

> "Third. Upon the transfer of the assets of the defendant by the Receiver pursuant to said offer, the Receiver shall forever be released, discharged and absolved from any and all liability whatsoever to the Government of the United States and to the State of New York for, by reason of, or in any way arising out of any past, present or future claim for taxes or otherwise against Morris White, Inc. and/or against Irving Trust Company, as Receiver of Morris White, Inc."

(5) It seems to us that no authorities are necessary for the purpose of establishing the foregoing plain and obvious

propositions. The assenting creditors were not compelled to accept the White Plan or to give up their claims against the Morris White, Inc. and take in substitution claims against The Morris White Handbags Corp. They were not compelled to reduce their claims by eighty per cent. and take in lieu thereof stock in The Morris White Handbags Corp. They clearly cannot now take both positions at the same time, and cannot now be creditors of both corporations at the same time. By their own act in investing in accordance with their own choice in The Morris White Handbags Corp., they cancelled, annulled and destroyed forever and for all purposes their original position as creditors of Morris White, Inc. and therefore cannot interpose for any purpose their original claims against Morris White, Inc. in reduction of the claim of these petitioners to payment from the assets of Morris White, Inc. Thereby they (even including the Federal and State governments) elected that their positions should be as creditors and stockholders solely of The Morris White Handbags Corp. In consequence they could have in the assets of Morris White, Inc. or in the proceeds of such assets no greater or superior claim as against these petitioners than The Morris White Handbags Corp. itself had; and, in view of the invalidity of the transfer of these assets as against these petitioners, the Morris White Handbags Corp. took, and must be deemed to have taken, those assets in entire subordination to the rights of these petitioners.

The case of *Northern Pacific Rwy. Co.* v. *Boyd*, 228 U. S. 482, 502, 506, proceeded on similar reasoning to a similar result. There it was held that notwithstanding a transfer of assets under a plan of reorganization had actually taken place, all non-assenting creditors could pursue those assets and recover from them the full amount of their claims, inasmuch as the plan of reorganization was invalid as to them and in consequence no bar to such recovery.

The case of *Howard* v. *Maxwell Motor Co.*, 269 Fed. 292, aff'd. 275 Fed. (C. C. A. 2nd) 53, is to the same effect.

FOURTH POINT.

In any event, and even if we are wrong in the foregoing contentions, the Court below should nevertheless have reversed the decree of June 15th, 1931, on the ground that, at the hearings on which that decree was heard, the case was disclosed to be one for a court of bankruptcy or, at least, not one for a court of equity.

In any event, the Court below should have adjudicated the rights of the parties as if the case were in bankruptcy.

I.

The case should have proceeded in bankrupty, or, at least, should not have been continued in equity.

(1). As already said (statement of facts, pp. 32, 52, 54, 58, 106, *supra*) the petitioners through their counsel repeatedly urged the District Court that the artificial language of the complaint and answer denying insolvency was a mere sham and a patent device to avoid the judicial sale required by the Bankruptcy Act and the other protections which that Act gives to unsecured creditors. In addition, Mr. Tuttle, petitioners' counsel, filed an affidavit pursuant to leave granted on the argument (R., 63, 64). This affidavit after setting forth certain grounds of opposition to the White offer, added (R., 137):

> "In addition, deponent respectfully submits that the moving papers and the statements as to the financial condition of Morris White, Inc. and as to this action made upon the argument upon the return of the order to show cause, *show that this case is not one justifying an equity receivership at all; and that the court has no jurisdiction to proceed in equity.*"

The prayer of Mr. Tuttle's affidavit was that the offer be rejected; and

> "Deponent further prays that the complaint herein be dismissed and the receivership vacated."

(2). Hence there is presented in this case the important question whether or not a federal court of equity, in a spirit of benevolence, is to take over the jurisdiction and subject matter committed by the Bankruptcy Act exclusively to courts of bankruptcy; or whether, on the other hand, a federal court of equity is to follow the traditional doctrine that it will conduct a receivership of corporations of the purely commercial class only for the purpose of a temporary moratorium and to conserve the assets with a view of the company's early rehabilitation.

In *Michigan ex rel. Michigan Trust Co.* v. *Haggerty*, 286 U. S. 334, this Court ponted out the grave importance of these considerations, Judge Cardozo saying at p. 345:

> "This court has had occasion to point out the abuses that can arise from friendly receiverships forestalling the normal process of administration in bankruptcy and enabling a tottering business to continue while creditors are held at bay, * * *. Receiverships for conservation have at times a legitimate function, but they are to be watched with jealous eyes lest their function be perverted."

This Court has authoritatively declared against so-called "friendly equity receiverships" based upon a complaint where the complainant was not a judgment creditor after a return of "*nulla bona*" on execution; and has made an exception only where lack of seasonable objection has permitted the receivership to continue for so long that irreparable damage would follow the vacating of it.

Thus, in *Harkin* v. *Brundage*, 276 U. S. 36, this Court said at p. 52:

> "We do not wish what we have said to be taken as a general approval of the appointment of a receiver under the prayer of a bill brought by a simple contract creditor simply because it is consented to at the time by a defendant corporation. The true rule in equity is that under usual circumstances a creditor's bill may not be brought except by a judgment creditor after a return of '*nulla bona*' on execution.

> When a receiver has been thus irregularly appointed on such a bill without objection, and the administration has proceeded to such a point that it would be detrimental to all concerned to discharge the receiver, the receivership has been permitted to continue because not seasonably objected to."

In the present case this "friendly equity receivership" was not only "seasonably objected to", but the courts below had before them ample proof that, as the petitioners urged, the administration of the estate properly belonged in the bankruptcy court or, at least, not in equity.

(3). It seems to us that the dangerous tendencies and erroneous conceptions of law involved in the precedent established by the decisions below were well analyzed and condemned by Judge Woolsey in *Municipal Financial Corporation* v. *Bankus Corporation*, 45 F. (2d) 902, and *Matter of Bankus Corporation*, 45 F. (2d) 907. There, as here, the equity proceeding was a so-called "friendly" one, instituted by a handy non-resident creditor professedly to secure a moratorium. There, as here, the complaint alleged that there was an actual excess of assets over liabilities, and that the difficulty was merely a temporary shortage of sufficient funds. But there, as here, it speedily developed, *immediately after the appointment of the receiver*, that the financial situation was altogether of a different character; that there was no relation between the book values and the intrinsic values; that the liabilities far exceeded the market value of the assets; and that the cash on hand was wholly inadequate for runing the company, to say nothing of paying its debts. Hence, notwithstanding that Judge Woolsey had himself appointed the receiver in equity, he decided that the facts subsequently revealed should move him as chancellor to vacate the receivership, wash his hands of the case, and recommend the parties to a Court of Bankruptcy. To quote his opinion (p. 906):

> "Here, on the facts as developed by the receiver's investigations, there is shown a variance—fatal

to the equitable relief here sought—between the admitted allegations of the complaint and the actualities of the situation which they purported to set forth.

"*There is not any right of sanctuary in an equity receivership in the federal court.*

"Such a receivership is merely *an extraordinary remedy* which involves taking a party under the protection of the court primarily for the purpose of allowing it a *moratorium* in order that it may work out its rehabilitation. It involves the possibility of savir the situation by allowing the moratorium, and necessitates sufficient funds to enable the receiver to carry on in the meantime."

The conclusion of Judge Woolsey's reasoning was thus stated by him (p. 906):

> "In these circumstances, applying the views which are expressed by the Supreme Court in the cases of *Harkin* v. *Brundage*, 276 U. S. 36, 51, 52, 48 S. Ct. 268, 72 L. Ed. 457, and *Pusey & Jones Company* v. *Hanssen*, 261 U. S. 491, 497, 500, 43 S. Ct. 454, 67 L. Ed. 763, I feel that I must terminate these receiverships, leaving it to the defendant corporations and their directors, stockholders and creditors to work out the solution of a situation with which I feel this court, sitting in equity, cannot properly be asked to cope."

(4). In *Harkin* v. *Brundage*, 276 U. S. 36, this Court laid down the following rule concerning the so-called "friendly" receiverships by consent (per Taft, C. J.; p. 55):

> "The desire of those who represent an embarrassed corporation to seek a refuge from active and urgent creditors under the protecting arm of an officer of the court, leads to strenuous efforts to frame a case which may under equity practice justify a receiver. * * * The temptation of the exercise of power and patronage in the selection of receivers and the management of great businesses under the court should not be a feather's weight in prompting court action."

In *Wheeler* v. *Badenhausen Co.*, 260 Fed. 991, the Court said:

> "There is a clear distinction between a receivership on the ground of insolvency and one for conservation of assets and rehabilitation for the benefit of creditors."

(5). *A fortiori*, a federal equity court has no power to perform the functions of a court of bankruptcy. A long line of authorities repudiate the idea that a federal court of equity has concurrent jurisdiction with a bankruptcy court or may substitute for it.

In Re Watts, 190 U. S. 1 this Court said (p. 27):

> "The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is *paramount*, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is *essentially exclusive.*"

(6). The following is taken from the "Annual Report of Special Committee on Equity Receiverships for 1926-27 appointed by the Association of the Bar of the City of New York", Year Book 1927 of the Association of the Bar, pp. 299, 321:

> "The function of the equity receivership, as your Committee conceives it, is to conserve the assets of a corporation really solvent but temporarily embarrassed financially until a plan of refinancing, rehabilitation or reorganization can be evolved. The use of such receiverships in cases where liquidation is inevitable or the continuance of such receiverships after hopeless insolvency becomes apparent involves, we think, the usurpation of the powers intended by Congress to be exercised by the bankruptcy court."

Similar articles denouncing the growing abuses of "friendly" equity receiverships have appeared in Yale

Law Journal, Vol. 19 (1910) p. 276, and in the Connecticut Bar Journal (1920-29) p. 1, under the heading "Equity Receiverships in the United States District Court for Connecticut."

II.

In Any Event, the Petitioners' Rights Should Have Been Administered and Safeguarded as in the Bankruptcy Act.

The question whether the rights of creditors in a so-called friendly equity receivership proceeding are to be administered and safeguarded as in bankruptcy, petitioners submit, has been answered by this Court in the affirmative in *Price, Receiver* v. *United States*, 269 U. S. 492 and *United States* v. *Butterworth-Judson Corp.*, 269 U. S. 504. There the question was whether the Government was entitled to priority on its claims for taxes under Sec. 3466 R. S. It was argued by the opponents that, while the Government was entitled to priority in bankruptcy, it was not entitled to such priority in a receivership proceeding. This Court held in favor of the Government.

It held that when the complaint was filed by a simple contract creditor, praying for the appointment of a receiver, the plaintiff could not have the relief sought without the consent of the defendant; that when the defendant consented to an appointment of the receiver, the consent was tantamount to an assignment for the benefit of creditors (which was an act of bankruptcy); and the creditors were entitled to payment in accordance with their "rights and priorities". It follows that in cases of friendly receiverships instituted by simple contract creditors with the consent of the defendants, the result is inescapable that the rights of creditors are to be administered and safeguarded as provided in the Bankruptcy Act. That is our case.

An opposite conclusion would lead to absurd results. It would mean that the rights of creditors under the Bankruptcy Act could be defeated by mere agreement between the corporation (bankrupt in fact) and one of its creditors,

to bring suit and allege that the bankrupt while financially embarrassed, is really solvent and get a receiver appointed. The bankrupt, by consenting to the proceeding, waives the defense of an adequate remedy at law, *and the court of equity becomes the business manager of the corporation with powers to disregard the rights of creditors.*

Whether there are any constitutional limitations on the exercise of such power is a question which we need not raise here. But we seriously doubt that Congress, in passing the Bankruptcy Act, contemplated that the rights of creditors thereunder could be suspended by receivership proceedings.

There were a number of rights and safeguards guaranteed by the Bankruptcy Act, of which petitioners were deprived by the order of the District Court approving the reorganization plan. But the Circuit Court of Appeals gave these petitioners no relief.

(1) *Preferential Payments.*

Under the Bankruptcy Act preferential payments are prohibited (Secs. 60a, 3 a2). In this case the defendant had assigned accounts receivable to its bank creditors, and the District Court did nothing to set aside those preferences. The Circuit Court of Appeals ordered that petitioners be afforded an opportunity to question the assignment of accounts (R., 173), but the District Court also permitted, *nay directed*, a preferential payment to a judgment creditor (R., 47), and immediately after the reorganization plan was approved, the Court also approved payments in full to a large number of small creditors (R., 132). The Circuit Court of Appeals failed to order that those preferences be set aside as a fraud upon the non-assenting creditors and as a violation of the Bankruptcy Act.

(2) *Administration Costs Excessive.*

Under the Bankruptcy Act the charges of the administration of the bankrupt estate and for counsel fees are care-

fully supervised (Secs. 48, 72 G. O. XXXV, XLIII), and are subject to objection on the part of creditors (G. O. XLII).

At the time when the "reorganization" plan came before the District Court, which was only seven weeks after the temporary receiver was appointed, the receivership costs were estimated at $50,000, and, above that, an indeterminate amount to counsel for the creditors' committee (R., 51).

In addition, the estate was subjected to an annual charge of $60,000 in the form of a salary for Morris White himself. The District Court thought this amount was "quite large," but did nothing to reduce it to a proper level (R., 114, 132, 152). The Circuit Court of Appeals likewise made no provision that the estate should not be taxed with exorbitant fees and other charges.

(3) *No Judicial Appraisal.*

Under the Bankruptcy Act the bankrupt estate must be appraised by disinterested appraisers, and the appraisals must be made available to the creditors (Sec. 70b). In this case no proper inventory was ever given to the court, nor was a judicial appraisal ever made. Petitioners time and again had demanded at least a certified statement of the assets and liabilities of the defendant corporation (R., 112, 123, 125), but no one would certify to the statement submitted, except for the unitemized certificate of the accountant as to the liabilities.

The District Court refused to direct that petitioners be furnished with a disinterested statement of the defendant's financial condition.

The Circuit Court of Appeals made no provision that petitioners be safeguarded in this requirement of the Bankruptcy Act. It ordered on Dec. 2, 1931, that an *estimate* be made as of June 15th, 1931, of property which was in the hands of respondents from April 6, 1931, when at neither of those dates was there any definite evidence as to the assets and liabilities of the corporation. In this connection, it must also be remembered that throughout the

proceedings the values of the assets of the corporation, as represented, depended largely on the purposes which the respondent sought to accomplish.

(4) *No Bona Fide Sale.*

Under the Bankruptcy Act a bona fide sale of property must be made prior to distribution (Secs. 64, 70(b)). It has already been shown that there was no sale (pp. 26, 50, *supra*). Petitioners repeat here that, if there is any doubt as to the necessity of ordering a sale of the assets of the corporation which is not subject to the Bankruptcy Act, there can be no doubt as to the requirement of a sale in the case of an insolvent private commercial corporation in a voluntary receivership (see pp. 25-31, *supra*).

(5) *No Opportunity for Examination of Bankrupt.*

Under the Bankruptcy Act, if a composition is allowed, then the bankrupt must file a schedule of assets and liabilities, and must subject himself to an examination at a meeting of creditors (Sec. 21(a), Sec. 12(a)). In this case there was no examination similar to that conducted under Sec. 21-A of the Bankruptcy Act. Petitioners constantly requested an opportunity to examine Morris White under oath (R., 54, 62, 106), and the District Court, after having stated that it would hear testimony or appoint a special master (R., 63), for some inexplicable reason changed its mind, and itself undertook to examine Morris White, without giving petitioners an opportunity for an intelligent examination, with Morris White and his associates and all books and records in Court, so that a certified public accountant could go into the matter thoroughly.

It will be noted that the statement of assets and liabilities submitted to the court (R., 134-5) contained an asset of $156,520.53 as debts due from officers and employees. After the perfunctory examination of Morris White by the court, counsel for one of the creditors elicited from counsel for the Receiver that Morris White himself owed over $137,700 to the corporation (R., 122). In addi-

tion to that, an amount of $2,277,714.89 was listed as investments in and advances to subsidiary and other associated companies (R., 134), and counsel for one of the creditors elicited that of this amount $1,700,000 was owed by the Morris White Holding Co. Inc. (R., 122). Morris White refused to state when he expected that amount to be paid, but evaded that question (R., 122-3); and then it became evident that an intelligent examination of the witness could not be conducted without the figures which petitioners had sought to obtain.

The refusal of the District Court to grant a reasonable continuance for that purpose was a clear abuse of discretion. Here all the evidence was in the possession of the receiver, represented by counsel who also represented the friendly complainant, and a reasonable time was necessary to gather the data for an intelligent examination. The Circuit Court of Appeals did not require that petitioners be afforded that opportunity.

(6) *Reorganization Not Accepted by Majority of Creditors in Amount.*

Compositions must be accepted by a majority of creditors both in number and amount (Bankruptcy Act, Sec. 12(b)). Here petitioners had no reason to believe that the "reorganization" plan was approved by a majority of creditors in number and amount. Yet, neither the district court nor the Circuit Court of Appeals required respondents to prove that the creditors committee was in a position to say to the court, as it did (R., 82):

> "Never mind the few objectors; in no proposition can we get 100%."

(7) *No Security Furnished.*

Under the Bankruptcy Act, security must be furnished by the bankrupt for the discharge of obligations assumed in a composition (Sec. 12(b)). In this case, the District Court approved the "reorganization" plan, which merely

reduced the claim of all the creditors, except claims for taxes, to twenty per cent. of their respective amounts. No security whatsoever was offered, nor did the District Court require any security for the payment of the obligations assumed by the new corporation. The Circuit Court of Appeals likewise left petitioners unprotected against any dissipation of the assets.

(8) *Diversion of Corporate Assets.*

Under the Bankruptcy Act, no composition may be approved, if the bankrupt is found guilty of such acts of commission or omission as would constitute a bar to his discharge in bankruptcy (Sec. 12(b) and Sec. 14(b)). In this case, it appeared, Morris White "took", as he stated, over $2,000,000 from the defendant corporation and "gave" it to the Morris White Holding Co. Inc. without any regard whatsoever to the rights of the creditors of the former corporation. Petitioners had no opportunity to examine Morris White fully on this transaction. The District Court considered the transaction improper, but did not hold Morris White liable to the creditors for the corporate funds diverted by him. This fund, together with the other assets, might have been sufficient to pay all the debts of the corporation. Nor did the District Court direct the receiver to press the claim against the Morris White Holding Co. Inc. or Morris White himself, or both. Instead, the entire plan seems to have been to condone this diversion of corporate funds at the expense of the creditors and to cancel the claim of the corporation. The Circuit Court of Appeals made no provision whereby petitioners should follow the assets of the defendant.

These were the rights and safeguards to which petitioners were entitled, and of which they were deprived. Petitioners maintain that if the assets of Morris White, Inc. are not sufficient to pay their claims in full, they should be safeguarded in their rights granted to them under the Bankruptcy Act as if the case had proceeded in bankruptcy.

FIFTH POINT.

The Circuit Court of Appeals erred in failing to reverse the decree of the District Court in so far as it held that the receivership costs, the fees of the attorneys for the receiver, and all other fees incident to the White offer and its acceptance, should be paid out of the Estate. No portion of these charges should, directly or indirectly, be thrown upon these petitioners or upon the amounts they are entitled to receive.

In approving the "reorganization" plan, the District Court held that "all allowances for services rendered or to be rendered in this proceeding, and all other fees incident to said offer and its acceptance" should be "payable out of the assets of this estate" (R., 152, 19, 20, 26). Thereby the allowances were given a priority. The Circuit Court of Appeals did not disturb that ruling.

In other words, in accordance with the White plan (R., 26), the petitioners who opposed the plan were in effect required to pay an aliquot share of the expenses of the receivership costs, of the fees of the receiver's counsel, and of the fees of the counsel for the Creditors' Committee supporting the plan (R., 26).

I.

The receivership costs should not be paid out of the Estate. At least, no portion thereof should be thrown upon these petitioners, directly or indirectly.

The avowed purpose of the receivership was to preserve the assets of the corporation for the benefit of the creditors. It was, therefore, the duty of the receiver and its counsel to be a neutral party to any plan proposed by Morris White or by any creditors friendly to him.

Booth v. *Clark,* 17 How. 322, 331;
Davis v. *Gray,* 16 Wall. 203, 218;

Quincy etc. R. R. Co. v. *Humphreys,* 145 U. S. 82, 91-2;
Equitable Trust Co. v. *Great Shoshone & Twin Falls Water Power Co.,* 245 Fed. 697; 249 Fed. 967;
Pennsylvania Steel Co. v. *N. Y. City Ry. Co.,* 198 Fed. 721, 728;
High on Receivers (4th Edition) p. 3;
Beach on Receivers (2nd Edition) p. 7.

In the present instance, a receivership ostensibly "for conservation and rehabilitation" was almost immediately converted, with the active cooperation of the counsel for the receiver, into a situation where the defendant corporation was promptly given the lethal blow and "liquidated" by a transfer of all its assets to a new corporation formed, controlled and operated by Morris White (the stockholder owning the defendant corporation), without giving anything at all to the Morris White, Inc., without payment of a nickel to the creditors, with a salary of $60,000 to White (R., 114-5), with a priority of about $50,000 for fees and expenses for receiver and its counsel (R., 51, 101), and with a priority for an unnamed amount for the fee of counsel for the "friendly" creditors (R., 26). And all this in a case of a corporation with only $5,000 in the treasury (R., 134), with book liabilities of over $1,072,000 (R., 32), and with assets of only problematic value!

It is a fair, if not inevitable inference, that just such a disposition was contemplated when the complaint was filed by Mr. Glass, who immediately became counsel for the receiver. The complainant was evidently *provided* for the purposes of the suit (R., 57, 74, 75). She is a resident of New Jersey, and to her, shortly before commencement of the suit, one of the bank creditors (a member of the so-called Creditors' Committee) assigned a note of Morris White, Inc. No allegation is made that the assignment was for value (R., 4).

The White offer was presented to the court upon the petition of the receiver, through Mr. Glass, within three

weeks after the receiver's appointment (R., 16, 32, 57, 75). This petition took the friendliest tone toward the White offer and closed with this highly significant recommendation to the court (R., 18):

> "Ninth. That in your petitioner's opinion prompt action is desirable *in order to facilitate the prompt termination of this receivership.*"

To the petition of the receiver there were annexed the consent of the Creditors' Committee (R., 33), and a statement that the liabilities of the defendant corporation were $1,072,000.30 (R., 32). No inventory or other statement of the assets or their value was attached or ever furnished.

At the very time that the counsel for the receiver was presenting the White offer to the court, he was also continuing to act as counsel for the complainant (R., 7). Presumably, Mr. Hollander, who was chairman of the Creditors' Committee (R., 34), and who "represents one of the New Jersey banks" (R., 56), is the representative on that Committee of the complainant's assignor bank. Thus, it reasonably appears that the counsel for the receiver is, in his capacity as counsel for the dummy complainant, the designee of this same Creditors' Committee who engineered this friendly receivership, who were the proponents of the White offer, and as to whom Mr. Glass himself said (R., 52):

> "The Creditors' Committee is responsible for the promulgation of the reorganization plan."

The Record shows that Mr. Glass also continued throughout to act as counsel for the dummy complainant, whose claim on behalf of the New Jersey National Bank & Trust Company was in the District Court included among those favoring the plan (R., 4, 7, 56). Thus, at all times Mr. Glass was actively aligned with the creditors advocating the White offer.

Page 47 of the Record shows that Mr. Glass appeared in the District Court for both the complainant and the

receiver, and page 165 of the Record shows that Mr. Glass appeared in the Circuit Court of Appeals in the same capacities.

So also when this matter was before this Court on the petition for writ of certiorari, a brief was submitted by Mr. Glass and others in which he opposed the granting of the writ.

Throughout the argument in the District Court on the subject of the acceptance of the White offer, the attitude of Mr. Glass, while professing neutrality (R., 49), was actually one of favoring advocacy. (See, for example, pages 37, 44, 48-52, 100-2 of the Record.)

We therefore submit that not only was this equity receivership improvident and obviously so at the time the White offer was submitted, but also that the attitude and multifold relationships of the receiver's counsel made this a "friendly" receivership typifying all the grounds on which this Court has based its warnings against such a receivership in:

Harkin v. *Brundage*, 276 U. S. 36;
United States v. *Butterworth-Judson Corp.*, 269 U. S. 504;
Re: Metropolitan Ry. Receivership, 208 U. S. 90.

Apparently the rule of this court against "friendly" receiverships received no consideration on the part of respondents. The rule, however, is of great and growing importance for the protection of creditors and of contract obligations. This Court must "put teeth" into the rule in order to make it effective, since the court below has given no effect to it.

Other courts have given effect to the rule laid down in *Harkin* v. *Brundage, supra.* See, for example,

Central Union Trust Co. v. *North Butte Mining Co.*, 26 F. (2) 675;
Municipal Financial Corp. v. *Bankus Corp.*, 45 F. (2) 902, 905.

In the recent case of *May Hosiery Mills* v. *F. & W. Grand etc. Stores,* 59 F. (2) 218, the District Court in Montana did not hesitate to look through the form and into the real purpose of the receivership suit. The court said:

> "After due consideration, taking the pleadings by four corners, looking through forms to discover intent, assuming at least the perspicacity of the average man, ignoring conclusions, giving due weight to facts, having in mind the principles of pleading and equity and the federal statute (Judicial Code Sec. 37 (28 USCA Sec. 80)), it is clear that the proceedings are collusive, sham, fictitious, in bad faith, of ulterior motive, for the benefit of defendant alone; * * * that to accomplish the illegal ends sought, and as a party to the conspiracy, the aid of the court is solicited; that the latter's cooperation by injunction and receivership would be abuse of the power of the court though within it, in disregard of its right and duty, and perversion of process to the injury of creditors and others without notice and not before the court.
>
> "A court of equity should not thus work inequity and convert the temple of justice to a place of injustice. No doubt defendant owes plaintiff, but none the less the case-made, by reason of procedure, motive, strategy, and object, is sham, fictitious, collusive, an affront to equity, insolent, and an imposition upon the court. The suit is on all fours Hardy's Case, supra (20 F. (2) 968). Plaintiff is a dummy or mere 'tool' of defendant, and the proceedings are 'collusive', to adopt the characterization of Chief Justice Taft in the like and later Harkin Case, supra (276 U. S. 36). The only reasonable inference is that the prime object of this suit is receivership as final relief, and unwarranted injunction and moratorium at creditors' expense; is to hinder and delay and so to defraud and oppress creditors; is to enable defendant by its executive vice president receiver to work its will with creditors; is to rid itself of unprofitable leases and other contracts, by repudiation, compromise, settlement on his terms, and to the disadvantage of creditors coerced

by the delay and expense of receivership indefinite if not for life prolonged * * *.

"If the scheme be furthered by the co-operation of, say, an amiable court, what is it but employment of the judicial club to beat off and hold up creditors until, wearied, they settle with or wait the pleasure of the debtor's executive vice president receiver shielded by the judicial gown?" (p. 220). * * *

"Slight is the probability, however, that any protest or voice crying in the wilderness will inspire repentance, make straight the way, or save this jurisdiction surely marked for destruction. But come that fatal day as come it will, to the ghost of our murdered authority which will not down, but rise to reproach us, this court, with a clear conscience, can protest, 'Thou canst not say I did it'." (p. 221).

The court not only denied the application for an ancillary receiver, but issued a rule to show cause to parties and *counsel* why they should not be punished for contempt. The court adjudged them in contempt and imposed a fine of $500!

The simplest way of making the rule against "friendly" receiverships effective is to let those bear the costs of such receiverships, who bring them about. Had Morris White and his friendly complainant not been under the impression that they could make the creditors pay the administration costs of this receivership, which for the first seven weeks were $50,000 (R., 51), they would have thought twice before imposing such proceedings on the court and on the petitioners.

There is ample precedent for the proposition that where a receivership is irregular, the costs should be borne by those who bring it about.

Fryer v. *Weakley*, 261 Fed. 509, 514,
Noxon Chemical Products Co. v. *Leckie*, 39 F. (2d) 318,

where it was held that the court had no jurisdiction to appoint a general receiver.

Hawes v. *First Nat'l Bank*, 229 Fed. 51, 59,

where there was failure to join an indispensable party.

Spencer v. *Taylor Creek Ditch Co.*, 194 Fed. 635, 643,

where the receiver rendered no actual service to the property.

See also

Ephraim v. *Pacific Bank*, 129 Cal. 589, 62 Pac. 177,

cited with approval in

Atlantic Trust Co. v. *Chapman*, 208 U. S. 360, 373,
High on Receivers (4th Edition) Sec. 796,
Beach on Receivers (2nd Edition) Sec. 774.

The same rule should apply to payment of receivership costs in an improper "friendly" receivership.

II.

In any event, the receiver's counsel fees should not be in whole or in part any charge, directly or indirectly, against these petitioners.

Petitioners should not be required to pay, directly or indirectly, any part of the fees of the attorneys and counsel for the receiver, who were also attorneys and counsel for the complainant and whose attitude and dual relationships have been already described.

The attorneys and counsel for the complainant should not have been appointed to act for the receiver, or, at least, should not have been permitted to continue for the receiver while at the same time continuing as attorneys and counsel for the complainant and for the partisan interests behind her and for which she was a dummy. In *Blair* v. *St. Louis, H. & K. Railroad Company*, 20 Fed. 348, the receiver applied for appointment of counsel and named the counsel for the plaintiff. The court refused to appoint the counsel for the plaintiff. It said (p. 349):

> "It is urged that the attorney for the plaintiff should be authorized to act for the Receiver, in as much as the plaintiff is especially interested in defeating all claims adverse to plaintiff's rights, and securing an economical administration of the estate. *To this it must be answered that he represents his own client, and the latter can employ him and pay him accordingly if desired, but cannot fasten his compensation on a fund in which he has not the sole interest, but often only a partial or adverse interest.* His appointment might be wholly inconsistent with his duties as plaintiff's counsel."

In a case where the district court had appointed a counsel for one of the creditors to act as counsel for the receiver, and, after the counsel had acted under the appointment, compensation was allowed by the district court, the Circuit Court of Appeals reversed the order and held that the counsel was not entitled to compensation.

> *Old Colony Trust Co. et al.* v. *Union Land and Cattle Co.*, 4 F. (2d) 449;

See also

> *High on Receivers* (4th Edition) Secs. 188 and 216.

The latest expression of this court on the right of attorneys to represent adverse interests is contained in the case of *Weil* v. *Neary*, 278 U. S. 160. Chief Justice Taft, delivering the opinion of the court, said (p. 168):

> "*Many abuses have occurred in the bankruptcy practice and none is more frequent than that by which the attorney for petitioning creditors becomes counsel for the trustees subsequently appointed. This mingling of interests, frequently conflicting, is generally regarded by courts as working to the detriment of one of the parties and to the undue advantage of another.* Experience has shown the wisdom and necessity of separating the function and obligation of counsel by forbidding the employment in different interests of the same person."

The Record discloses, as above set forth, that this equity receivership was a mere incident to the plans of the so-called Creditors' Committee and was engineered by that Committee. The charges of all counsel who continued to represent those interests should be borne by those interests themselves.

To throw even an aliquot portion thereof upon these petitioners, who have been obliged strenuously to fight those interests to secure the petitioners' rights, would, we submit, be not only illegal but grossly unfair and immoral.

CONCLUSION.

Petitioners therefore pray that the decree of the Circuit Court of Appeals be reversed and the cause remanded to the District Court with the following directions: (1) that the so-called "reorganization plan" be held not to affect the claims of the petitioners herein against Morris White, Inc.; (2) that petitioners herein be permitted to prove and recover their claims against Morris White, Inc., and its assets and the proceeds thereof wherever found, save when in the hands of a *bona fide* purchaser for value and without notice; (3) that the property of Morris White, Inc., whether in the hands of the receiver or in the hands of the Trustee in Bankruptcy of the Morris White Handbags Corporation, be subject to payment of those debts before any costs or obligations of the Receiver of Morris White, Inc. or of the Trustee in Bankruptcy of the Morris White Handbags Corporation and before any claims against the Morris White Handbags Corporation are paid; (4) that if the assets in the hands of the Receiver herein and in the hands of the Trustee in Bankruptcy of the Morris White Handbags Corporation are insufficient to pay the claims of the petitioners herein, petitioners herein should be paid in proportion to their claims and should be entitled to all their rights as if the case had proceeded in bankruptcy as of April 6, 1931.

Dated, New York, November 14th, 1932.

Respectfully submitted,

CHARLES H. TUTTLE,
of New York,

GREGORY HANKIN,
of Washington,

SAUL S. MYERS,
of New York,

Counsel for Petitioners.

Appendix.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

VALERIA E. CORIELL, Complainant, *against* MORRIS WHITE, INC., Defendant.	IN EQUITY No. E 59-126

ORDER ON MANDATE.

This cause having heretofore come on for hearing in the United States District Court for the Southern District of New York, and a decree, dated June 15, 1931, having been entered herein approving the offer of Lily White herein, and National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co. Inc., having thereafter by an appeal procured a transcript of the record to be brought into the United States Circuit Court of Appeals for the Second Circuit, and the said United States Circuit Court of Appeals for the Second Circuit having transmitted to this Court its mandate dated December 2, 1931, by which it appears that at the October Term of said Court for 1931 the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit on the said transcript of record and was argued by counsel, on consideration whereof it was ordered, adjudged and decreed that the said order of said District Court be reversed with costs taxed at the sum of $1,175.30, and the cause be remanded to the District Court

for further proceedings in accordance with the opinion of said Circuit Court of Appeals for the Second Circuit;

Now, upon reading and filing the said mandate, it is

ORDERED, ADJUDGED AND DECREED that the said mandate of said United States Circuit Court of Appeals for the Second Circuit in this cause be and the same hereby is made the judgment of this court; and it is further

ORDERED, ADJUDGED AND DECREED that the said decree of this court dated June 15, 1931 approving the offer of Lily White, in so far as it affects the rights of National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co., Inc., the appellants herein, be and the same is hereby reversed, with costs of the said appeal as taxed at the sum of $1,175.30, together with the costs in this court, taxed at ; and it is further

ORDERED, ADJUDGED AND DECREED that National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co., Inc., have judgment against Irving Trust Company, as Receiver in Equity of Morris White, Inc. for the sum of $ costs on appeal as taxed and costs in this court, and that Irving Trust Company, as Receiver in Equity of Morris White, Inc. be and it hereby is directed to pay said costs out of moneys in its possession as such Receiver in Equity; and it is further

ORDERED, ADJUDGED AND DECREED that Earl B. Barnes of New York City, Borough of Manhattan, City of New York, be and he hereby is appointed Special Master herein to hear and take testimony and other evidence and to report thereon to this court, in conformity with the aforesaid opinion of said United States Circuit Court of Appeals; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall proceed with said hearings and report thereon

with all convenient speed and as rapidly as he deems it proper, in view of all the circumstances of the case; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall ascertain the several amounts of the respective claims of National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co., Inc. and make an appraisal of the realizable value of said claims as of June 15, 1931; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall take an account of the assets of Morris White, Inc. as of the 15th day of June, 1931, including among such assets all causes of action belonging to Morris White, Inc. and shall ascertain and report the then realizable value of said assets as if sold at a public sale; and shall also take account of the liabilities of Morris White, Inc., as of April 6, 1931, and shall ascertain and report which if any, of said liabilities are entitled to priority of payment; and shall also take an account of the obligations of the Receiver herein and of the expenses of administration of the estate herein incurred up to the fifteenth day of June, 1931; and shall determine through examination of officers and/or agents of the defendant and/or The Morris White Handbags Corporation, the nature, quality and amount of inventory on hand as of such dates as may be pertinent to this inquiry; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall conduct hearings and take testimony and other evidence and report as to whether or not preferences or transfers, voidable either at law or in equity, as of June 15, 1931, at the instance of any creditor or other party interested in the assets of the Morris White, Inc., have been granted by the pledging of any assets of Morris White, Inc. or otherwise; and at the hearings before the said Special Master any creditor of Morris White, Inc. shall have the opportunity of questioning the assignment of ac-

counts by it as collateral and of questioning any such voidable preference or transfer that may have been made; and it is further

ORDERED, ADJUDGED AND DECREED that if it is established that any such voidable preferences or transfers have been granted or made out of the assets of Morris White, Inc., said preferences or transfers are to be regarded by said Special Master as invalid for the purposes of his calculations and the amounts of said preferences or transfers are to be considered by said Special Master as part of the assets of said Morris White, Inc.; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall ascertain and report the aliquot share of the assets to be awarded and paid in cash, subject to further order of this court, to National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein, and G. Levor & Co., Inc. out of the sum ascertained to be the amount that would have been realized for the assets of Morris White, Inc., on June 15, 1931, had a public sale of said assets been held, after the deduction from said sum of such portion of the obligations of the Receiver and the expenses of adminstration herein as would have been properly chargeable against the estate had the assets of Morris White, Inc. been liquidated by sale, and the proceeds distributed to creditors in ordinary course, and after the deduction of the liabilities of Morris White, Inc. entitled to priority of payment; or at the option of each of them the preferred stock and notes heretofore offered to them, pursuant to said offer of Lily White, may and shall in like manner be valued by said Special Master, as of the date the reorganization plan became effective, to be awarded and to be paid in cash to them or any of them subject to the further order of this court; and it is further

ORDERED ADJUDGED AND DECREED that no bank or other creditor of Morris White, Inc. shall collect on any security which has been pledged as collateral and in addition thereto

receive preferred stock and notes but that each bank or other creditor holding any security may agree to receive and shall receive preferred stock and notes only for such sum or sums as their respective claims exceed the realizable value of said collateral; and the said Special Master shall ascertain and report the value of the security, held by secured creditors, for all purposes, as of June 15, 1931; and it is further

ORDERED, ADJUDGED AND DECREED that the expense of the hearings before the said Special Master, including his compensation and the cost of a copy of the minutes of the Special Master shall be paid by The Morris White Handbags Corp. and shall be a charge and a lien upon its property; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall give notice to all the parties hereto of the filing of his report and thereafter any of the parties may apply to this court for such further order thereon as they may be advised; and it is further

ORDERED, ADJUDGED AND DECREED that subject to the provisions of this order and the further order of this court, the reorganization plan represented by the aforesaid offer of Lily White, as modified by this order and by the order entered herein, dated June 15, 1931, be allowed to continue in operation and The Morris White Handbags Corp. be and it hereby is permitted to continue in the conduct of the business heretofore transferred to it pursuant to the terms of the aforesaid order, dated June 15, 1931; and it is further

ORDERED, ADJUDGED AND DECREED that all persons, firms or corporations which have heretofore sold and delivered goods, wares and merchandise and/or rendered services to the said The Morris White Handbags Corp. in the regular course of its business and/or which may hereafter sell and deliver goods, wares and merchandise and/or render services to the said The Morris White Handbags Corp. in the regular course of its business shall be entitled to priority

of payment out of the assets of The Morris White Handbags Corp., other than such assets as were transferred to the said The Morris White Handbags Corp., pursuant to said order dated June 15, 1931, for any such indebtedness now or hereafter owing by the said The Morris White Handbags Corp. to any such persons, firms or corporations; and it is further

ORDERED, ADJUDGED AND DECREED that A. W. COPP, or such other representative as Irving Trust Company may appoint in place of said A. W. Copp, shall, at the expense of The Morris White Handbags Corp., attend daily, if possible, at the place of business of The Morris White Handbags Corp., and said The Morris White Handbags Corp. shall render to the said A. W. Copp full and complete reports, as and when requested by him, of all details of its business and affairs as the same are carried on, including therein any and all information with respect to purchases, sales, payments, receipts, salaries, rents, expenses, contracts, commitments, and any other matters or things which may in any way affect the assets or liabilities of the said The Morris White Handbags Corp., that the said The Morris White Handbags Corp. shall give to the said A. W. Copp, or any representative named in his place, any information whatever appertaining to its affairs which the said A. W. Copp, or any representative named in his place, may request; that the said A. W. Copp, or any representative named in his place, shall report to the attorneys for the National Surety Co., from time to time as requested by them; and that Irving Trust Company shall not be under any liability whatsoever as Receiver in Equity of the defendant or otherwise for the management of the business of The Morris White Handbags Corp., or the performance by A. W. Copp, or the representative named in his place, of the duties imposed upon him by this order; and it is further

ORDERED, ADJUDGED AND DECREED that pending the entry of an order of this court upon the report of the said Special

Master and for the purpose of securing to National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co. Inc. payment by the said The Morris White Handbags Corp., out of the assets transferred to the said The Morris White Handbags Corp., pursuant to the order herein dated June 15, 1931, of the amounts which may be determined to be paid to them in cash upon their respective claims, a lien is hereby imposed upon all of the assets of Morris White, Inc. transferred to and remaining in the possession of said The Morris White Handbags Corp., pursuant to said order dated June 15, 1931; except that as to such of said assets as the said The Morris White Handbags Corp. shall hereafter in good faith transfer in the regular course of its business for fair and proper consideration, said lien shall attach to the proceeds of such transfers or successive transfers of such proceeds, and the said The Morris White Handbags Corp. is hereby enjoined and restrained, subject to the further order of this court, from transferring any of said assets of Morris White, Inc. remaining in its possession except in good faith in the regular course of its business and for fair and proper consideration, unless the said The Morris White Handbags Corp. shall file a bond or other security in such amount as may be fixed and approved by this court after hearing the parties in interest; and it is further

ORDERED, ADJUDGED AND DECREED that the Morris White Handbags Corporation having paid to Irving Trust Company herein the sum of $33,322.32, represented by it to be the amount payable by it on January 2, 1932 on account of the notes issued pursuant to the terms of the sale approved in the said decree on June 15, 1931, such payment shall not, without further order of the Court, be applied on account of said notes but shall be held by Irving Trust Company as depositary, without prejudice to any of the rights of the parties to this proceeding; and it is further

ORDERED, ADJUDGED AND DECREED that all question not hereby disposed of are reserved for future adjudication; and that for the purpose of enforcing the provisions of this decree and for the purpose of entering such further orders or decrees as the court may hereafter from time to time determine, the term of this court is hereby extended and jurisdiction of the cause is hereby retained. This order is without prejudice to the motion heretofore made by the Equitable Life Assurance Society to set aside the aforesaid order of June 15, 1931, and without prejudice to such right as it may assert within thirty days after the filing of the report of the Special Master and the entry of an order thereon, to have its aliquot share of the assets of Morris White, Inc., paid to it in cash in accordance with the procedure hereby established, and to have a lien as above provided for the payment of such share.

Dated February 2nd, 1932.

JNO. C. KNOX,
U. S. D. J.

FILED
DEC 15 1
CHARLES ELMORE

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1932.

No. 8.

NATIONAL SURETY COMPANY, et al.,
Petitioners
(Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent
(Appellee Below),

MORRIS WHITE, INC.,
Respondent
(Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent
(Appellee Below),

MICHAEL HOLLANDER, et al., Constituting a Committee of Creditors of Morris White, Inc.,
Respondent
(Appellee Below).

PETITIONERS' REPLY BRIEF.

CHARLES H. TUTTLE
of New York
GREGORY HANKIN
of Washington
SAUL S. MYERS
of New York
Counsel for Petitioners.

INDEX.

	PAGE
I. As to the Respondents' Statement of Facts	1
II. Respondents' statements outside the record	10
III. The claim that we have raised points not presented in the petition for certiorari....	12
IV. The claim in respondents' brief that the dual function exercised by the receiver's counsel was not criticised below.....	13
V. The respondents' claim that this Court cannot consider the impropriety of administering this estate in equity	14
VI. Reply to the First Point of Respondents' Brief (p. 25)	16
VII. Reply to Respondents' Second Point (p. 46)	27
VIII. The petitioners wish to make their position clear that they are appearing here in behalf of themselves and not in behalf of others, and that they are asking a reversal as to themselves	30
IX. With the Court's permission, we will be pleased to hand up, as an addendum to our reply brief, such parts of the subsequent proceedings in Coriell *v.* White and in the Handbags and White Holding Co. bankruptcy proceedings as we believe essential to a proper perception of the realities of this case, with the right reserved to our adversaries to hand up such parts as they deem essential on their side.....	31
APPENDIX A. Adjudication of bankruptcy as to Morris White Handbags Corp.	32
APPENDIX B. Decree directing sale of the tangible assets of Morris White Handbags Corp. for $53,850	34

Table of Cases.

	PAGE
Boyd case, 228 U. S. 482, 490, 491	16
Harding *v.* American Summatra Company, 14 F. (2) 168	20
Kansas City case, 240 U. S. 166, 173	16
Legislative Basis of Corporate Reorganization, 80 Penn. Law Review, 579, 583	20
Meadows *v.* United States, 281 U. S. 271	12
Michigan ex rel. Michigan Trust Company *v.* Haggerty, 286 U. S. 334, 345	15
Michigan *v.* Michigan Trust Co., 286 U. S. 334, 345	13
Olmstead *v.* United States, 277 U. S. 438, 455, 466	12
Re Metropolitan Railway Receivership, 208 U. S. 109, 111	21
The Phipps case, 284 Fed. 945	19

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1932.

No. 8.

NATIONAL SURETY COMPANY, et al.,
Petitioners
(Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent
(Appellee Below),

MORRIS WHITE, INC.,
Respondent
(Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent
(Appellee Below),

MICHAEL HOLLANDER, et al., Constituting a Committee of Creditors of Morris White, Inc.,
Respondent
(Appellee Below).

PETITIONERS' REPLY BRIEF.

I.

As to the Respondents' Statement of Facts.

The respondents' brief, in its statement of facts, selects various *ex parte* assertions in self-interested *talk* before the District Court and presents these hearsay

remarks, opinions, guesses and prophecies as if they were proven facts competently established and a proper record upon which the District Court could base its decree.

In our Main Brief at page 16 we have anticipated this method of creating a so-called "Statement of Facts", and we have there shown that before the District Court and the Court of Appeals we repeatedly and strenuously objected to the acceptance of mere self-interested and hearsay declarations as competent proof; that the only *affidavits* submitted were submitted by us; and that in any legal sense there was no real or competent proof before the District Court justifying the acceptance of the White offer.

Before the District Court, for the very purpose of testing out the truth of these assertions and of ascertaining the actual facts, we repeatedly sought a fair opportunity to examine into the situation judicially (R., 58, 62, 63, 54, 71, 66). As Mr. Tuttle then said (R., 58):

> "Mr. Tuttle: What we want, these creditors whom I represent, is a fair opportunity to examine, under oath, the people who have appeared, about this complete 100 per cent financial bankruptcy. We do not want to have any proposed offer of settlement put over on us by any group, large or small. That is why we are opposing this. How about the assets? What is the suggestion by means of which we can know what is really being done here. We are asked to take a pig in a poke, and a big pig. I ask for an opportunity to examine, before it is finally concluded, under oath the members of the Committee. I would like to find out why it is that the several large financial institutions here are willing to take this pig."

Mr. Tuttle further said (R., 62):

> "The clients that I represent are opposed to this offer that has been suggested here, because there is, in these papers, nothing stated on which they can form any judgment at all, and the offer, as it stands is, in their judgment, simply—

> now, what I desire is an opportunity, such as we would have, in view of the fact that this is a bankruptcy, that we would have under the Bankruptcy Law, to proceed with the examination."

These very reasonable demands for a proper legal record before the District Court acted, were opposed by the specious and significant assertions that a delay of even twenty-four hours would be prejudicial (R., 116, 118, 38, 63). The result was that the District Court refused even a day's adjournment, and conducted only a perfunctory examination of White, the petitioners protesting their inability to proceed without time for preparation. As a matter of fact the respondents took two weeks to enter the order on the decision. (See our Main Brief, p. 18.)

We can readily illustrate the manner in which the respondents' brief has made statements unsupported by the Record or has taken these self-interested and hearsay assertions by themselves and their counsel and presented them to this Court as if they were established facts competently proven,—as distinct from mere talk and argument challenged by these petitioners. For example:

(1) The respondents' brief says (p. 14):

> "Creditors with claims aggregating approximately $850,000 out of the total listed liabilities of $1,072,000 affirmatively voiced their approval of the plan."

No page of the Record is cited for this assertion and the Record contains nothing at all to sustain it,—certainly no competent proof of its truth. On the contrary, the claims of counsel for the so-called Creditors Committee as to the number and amount of creditors approving the plan were vigorously challenged and put in issue by petitioners' counsel and no proof of these claims was

submitted (R., 66). The petition of the receiver presenting the White offer said that the Creditors' Committee "represent creditors whose claims aggregate $589,000" (R., 17).

(2) The respondents' brief says (p. 18):

> "It does appear on the record that the plan of reorganization was approved by 98% of defendant's 250 creditors."

No page of the Record is cited for this assertion; and, so far as we can ascertain, nothing of the kind appears anywhere in the Record.

(3) The respondents' brief says (p. 14):

> "That (Creditors) Committee directly represented merchandise creditors with claims aggregating $178,000 and bank creditors with claims aggregating $441,500."

It is true that counsel for the Creditors' Committee *asserted* that such was the fact (R., 72); but opposing counsel asserted the opposite, saying (R., 66):

> "I do not know whether it is proper at this time to set up, interpose the idea that this Creditors' Committee is not representative of the creditors; it does not represent either the majority in amount nor in number, as I understand it; and I have been at some pains to find that out."

Certainly no proof was submitted as to the number or amount of claims which the Creditors' Committee actually represented; and the Court did not grant the non-assenting creditors' request for an examination to determine the truth of the matter (R., 58, 62, 63).

Moreover, this statement of counsel to the Creditors' Committee is interesting as revealing that the non-assenting creditors (the petitioners) held claims ($117,077.57) nearly as large as the unsecured creditors thus

said to be represented on the Committee; whereas the secured banks' creditors were under charges of having received unlawful preferences,—charges which, as the Court of Appeals held, should have been investigated (R., 173).

(4) The respondents' brief says (p. 6):

> "It (the defendant corporation) employed between three and four thousand people (R., 68)."

This statement illustrates perfectly the impropriety of building up a so-called "Statement of Facts" based on excerpts from self-serving speeches to the District Court by interested parties. The citation in respondents' brief is to a speech by Dr. Sirovich. There was no suggestion even in his remarks that the corporation had been employing that number of people at the time when the receiver was appointed or within any recent time prior thereto.

Contrast this flat statement in the respondents' brief with what approaches the real truth of the situation, as disclosed in the following dialogue (R., 113):

> The Court: "How many people will you employ there, Mr. White, if you go back into business?
>
> Mr. White: Immediately would be four or five hundred."

(5) The Respondents' brief says (p. 20):

> "Requests for information made at the hearing by petitioner's counsel were complied with; an inventory was available and every question that was asked was answered."

Such an extraordinary assertion can scarcely be serious. Our requests for an adequate opportunity for an examination of the so-called Creditors' Committee, and as to the so-called appraisal, the circumstances sur-

rounding the White offer, etc. (R., 58, 62, 63, 112, 115-7, 106, 123), were futile in view of the Court's immediate acceptance of the White offer. The record discloses conclusively that there was no inventory, no appraisal, no enumeration of claims, and no report by the Receiver; and that not even a date had been fixed for the filing of claims (R., 138, 139, 141, 123). The Court did undertake to call Morris White to the stand for immediate examination; but these petitioners protested, and properly so, that such sudden action gave them no opportunity to conduct an effective examination even of him —and none at all to conduct the other examinations which were asked (R., 58, 62, 63, 72, 106, 112, 115-7, 123). (See page 18 of our main brief.)

Requests by these petitioners for information and dependable data were certainly *not* complied with (R., 52, 54, 55, 62, 106, 112, 123, 125, 127).

(6) The respondents' brief says (p. 8):

> "At the suggestion of that Committee, Mr. Moakes, the representative of the National Surety Company—the leading petitioner—became a member of the Committee ex officio (R., 72, 73). Mr. Moakes participated in all the deliberations of that Committee (R., 72, 73, 124) and himself stated at the hearing before Judge Knox:
>
> 'It is true I attended every meeting' (R., 124).
>
> Mr. Moakes further stated that he had submitted to the National Surety Company the Committee's various reports (R., 124)."

This is a misleading and inaccurate statement. Mr. Moakes said (R., 124):

> "Your Honor, I was not on the committee. * * * As I told them, I could not bind my Company in any way; that I would submit the entire report to my company; and I have submitted reports from previous meetings, where they discussed other

methods of reorganization and other methods of stock issue; and that is about all I can say."

(7) The respondents' brief says (p. 6):

> "Less than a year prior to the appointment of the receiver, the defendant owed more than $3,000,000 to its creditors (R., 74). That indebtedness had been reduced to $1,072,000 at the date of appointment of the temporary receiver (R., 135)."

But when were these alleged payments made, and who got the benefit of the possible preferences resulting therefrom? Even this scanty record discloses the admissions of counsel for the Creditors' Committee that the informal "friendly receivership" by a committee of creditors antedated by some five months the formal receivership on April 6, 1931; and that, during this period of five months, $750,000 was paid out to certain creditors, so that the cash in the treasury was stripped down to $5,614.60 (R., 74, 75, 107, 121, 134). The record also discloses the admission that during that period the bank creditors had their claims paid down and received receivables as security (R., 173, 19, 49, 50, 53, 121). The circumstances of these payments should have been the subject of thorough judicial inquiry,—and in a court of bankruptcy they certainly would have been thus inquired into. Our demands for such an inquiry were defeated by the Court's almost immediate acceptance of the White offer (R., 58, 62, 63).

(8) The respondents' brief says (p. 9):

> "Approximately $250,000 of the accounts receivable have been pledged as collateral to banks for loans concurrently made (R., 134, 72)."

On page 134 of the Record is the accountants' report. There is nothing there to show that the receivables had been pledged concurrently with loans made. Nothing was

submitted to the court to support the statement to that effect by Mr. Weisman at page 72 of the Record. This was one of the matters which the Circuit Court of Appeals thought should be inquired into for the purpose of determining whether unlawful preferences had been created (R., 173).

(9) The respondents' brief says (p. 9):

> "Thus it appears that, on the date of the appointment of the receiver herein, there were preferred charges against the estate for approximately $200,000, to be satisfied prior to distribution to general creditors."

This is not correct. The U. S. Government said that its claim was $90,000 for undisputed items (R., 70). White's accountants said that it was $80,624.36 (R., 134). The State only claimed $57,000 according to White's attorney (R., 50). The accrued payroll was $16,388.04 (R., 134). This makes in the aggregate only $163,388.04.

(10) The respondents' brief says (p. 11):

> "The Holding Company was threatened with the foreclosure of a blanket second mortgage *and unsecured creditors of that company had filed a petition in bankruptcy against it.*"

We can find nothing in the record to support this statement. The fact is, if we follow counsel outside the record, that the petition in bankruptcy was filed by Mr. Glass on behalf of the Irving Trust Company as receiver of Morris White, Inc., and that the adjudication was consented to on behalf of the corporation by Mr. Stern (White's counsel on this Record).

(11) The respondents' brief, at pages 8 and 9, refers to the statements of assets and liabilities prepared by Klein, Hinds & Finke, accountants, as of April 6, 1931. But the brief fails to mention that these so-called amounts were merely aggregate book amounts, to wit,

mere figures taken from the books themselves. No one has claimed that this statement of books amounts had any relation whatever to reality;—indeed, every one has conceded that it did not (R., 62, 90, 91, 95, 100, 101, 118, 119).

(12) The respondents' brief, on page 10, refers to a statement of Mr. Morris White that in April, 1930, the Morris White Holding Company had raised two and one-quarter million dollars upon its properties by loan from the S. W. Straus & Co. and had turned that amount over to the defendant corporation.

But the brief does not call attention to the fact that the very accountants' statement as of April 6, 1931, which the respondents themselves gave to the District Court and which was taken from the books of the defendant corporation itself, does not list this transaction in any way. On the contrary, it shows, among the so-called assets, liabilities to the corporation from associate companies in the sum of $2,277,714.89 (R., 134). Indeed, the respondents' brief admits (p. 10) that the Morris White Holding Company is indebted to the Morris White Inc. in the sum of $1,700,000.

(13) The respondents' brief says, at page 14, that after the publication of the notice several prospective purchasers "examined the assets (R., 127) but no other bidder appeared (R., 151)."

All that the record says is that Mr. Glass, counsel for the Receiver, said that "some prospective purchasers" examined the "stock" with a view to bidding for the assets (R., 127).

(14) On page 15 the respondents' brief tries to work in the name of Carter, Ledyard & Milburn, and cites the Record, pp. 66, 67. There is nothing in the record (so far as we can find) to show that Carter, Ledyard & Milburn ever appeared in this case at all, and there is nothing in the record to show that Mr. Lyeth of that firm ever attended any hearing anywhere on this matter.

II.

Respondents' statements outside the record.

Certain statements in respondents' brief outside the record have already been mentioned. We now give one more example.

At page 18 the respondents' brief asserts that because, ending with the year 1929, Morris White Inc. had made annual profits averaging about $500,000 a year (according to the *ex parte* assertion of Mr. White's counsel, R., 90) "the reorganized corporation within two years would have been able to discharge in full its $1,000,000 of liabilities."

This statement borders, we submit, upon the absurd as well as carrying implications which are off the record. The fact that before 1930 the corporation had shown earnings argues nothing as to its possession of earning capacity after the financial catastrophe in the Fall of 1929 and the subsequent depression. Elsewhere in their brief (p. 6) respondents' counsel conceded that orders for millions of dollars had been cancelled "when the present depression began"; and, according to the admission of White himself, there was at the time when the receivership began "not a dollar" of orders on hand and the market was constantly falling (R., 51, 102). White himself was bankrupt; his outstanding investment in the stock of the Bank of United States had been turned from an asset into a liability; and his real estate ventures in which he had lost, according to the admission of counsel, some $20,000,000 were bankrupt (R., 120, 86, 91, 67, 131). The defendant company itself was down to about $5,000 in cash, whereas its liabilities were over $1,000,000 (R., 32, 52, 134-5).

It is surprisingly audacious, therefore, for the respondents' brief to argue that in May 1931 this defendant company had a goodwill which (p. 18)

> "within two years would have been able to discharge in full its $1,000,000 of liabilities".

As a matter of fact, the records of the District Court show that on April 29, 1932, the Morris White Handbags Corporation was itself declared bankrupt, and that by decree dated June 6, 1932, the Irving Trust Company as trustee of its assets was directed to sell them and they were sold for $53,850. See Decrees printed in the Appendix.

III.

The claim that we have raised points not presented in the petition for certiorari.

At page 3 the respondents' brief quotes from our petition for certiorari "the questions presented."

A comparison thereof with the points made in our present main brief shows that each one of the latter is embraced within the scope and subject matter of the former. In the petition for certiorari we certainly did argue in so many words that the case should not have been in equity but presented "a typical case for the Bankruptcy Act and for a rigid investigation under Section 21a" (pp. 4, 15); and that the Circuit Court of Appeals erred in confining the rights of the petitioners to an aliquot share of a theoretical sale as distinct from the rights claimed for the petitioners in our present main brief (pp. 15-20).

Moreover, the petitioners have a clear right to elaborate in their brief and argument on the questions mentioned in the petition for a writ of certiorari and to clarify and particularize the relief sought and even to add to or change the reasons urged for the reversal (*Meadows* v. *United States*, 281 U. S. 271). This Court is in no way precluded from considering the entire case (*Olmstead* v. *United States*, 277 U. S. 438, 455, 466).

IV.

The claim in respondents' brief that the dual function exercised by the receiver's counsel was not criticised below.

The respondents' brief says that the District Court appointed the complainant's counsel to be also counsel for the Receiver (p. 4); but we find in the record no such order nor any warrant for such assertion.

But however this may be, the respondents' brief wholly misconceives our position on this subject. We are not undertaking to appeal from any such order if there were one, nor to contend that it was void. Our contention is that the circumstance that the attorney and counsel for the dummy complainant of the Creditors' Committee also acted as the attorney and counsel for the Receiver was a potent circumstance illustrative of the true nature and purpose of this so-called friendly receivership; was good reason why it should "be watched with jealous eyes", to use the recent language of Mr. Justice Cardozo (*Michigan* vs. *Michigan Trust Co.*, 286 U. S. 334, 345); and was evidence that the true function of the receivership as a neutral agency was being "perverted" (*id*).

In other words, these dual and conflicting positions of the receivers' counsel were relevant circumstances in determining the good faith of the action and of the proceedings concerning the so-called White offer; in determining the weight to be given to the statements made by him in the record; and in determining whether or not the court below was right in confining these petitioners to an aliquot share of a theoretical sale after deducting the receivership expenses. (See pages 50 *et seq.* of our main brief).

V.

The respondents' claim that this Court cannot consider the impropriety of administering this estate in equity.

At page 4 the respondents' brief claims that this Court may not now consider the petitioners' arguments against the propriety of the administration of this estate in equity rather than in bankruptcy, because this Court denied a petition for a writ of certiorari to review the order of the Circuit Court of Appeals affirming the order of the District Court of June 3, 1931, appointing Irving Trust Company as permanent receiver.

The respondents forget that in their brief in opposition to the latter petition for a writ of certiorari they strongly urged that the order of the District Court making the receivership permanent recited the alleged fact of there being "no opposition to the making of said receivership permanent" (p. 4). They there argued that this recital was binding, and hence that there was nothing for this Court to review in connection with that order (p. 7). The present record, however, discloses that long before either the order of June 3, 1931 or the order of June 15, 1931 (the latter being the one now under review), counsel for these petitioners had filed with the District Court full affidavits alleging in so many words that "This case is not one justifying an equity receivership at all"; that "the Court has no jurisdiction to proceed in equity"; and that "deponent further prays that the complaint herein be dismissed and the receivership vacated" (R., 137).

Certainly there is nothing in the present record to bar this Court in any way from determining that at the time when this order of June 15, 1931 was entered over the objections urged in the said affidavits filed on May 27, 1931 (R., 135-141), this case should not have continued

to proceed in equity. Certainly also there is nothing in the present record to prevent this Court from holding that in any event the rights of the parties should have been determined as if the case were in bankruptcy. (See p. 39 of our main brief).

This Court has recently held in *Michigan ex rel Michigan Trust Company* v. *Haggerty*, 286 U. S. 334, 345, that these so-called "friendly" equity receiverships for alleged conservation "are to be watched with jealous eyes lest their function be perverted." Such watchfulness could not be practiced if the Court were concluded by prior orders and could not act to suppress a receivership where it discovered that suspicion had ripened into conviction.

VI.

Reply to the First Point of Respondents' Brief (p. 25).

(1) The respondents wholly misconceive the decision of this Court in the *Boyd* and *Kansas City Railway Co.* cases.

In both those cases there was an actual public sale at auction, preceded by full inventory, appraisal and public advertisement. In both cases the reorganizing group was obliged to bid an actual amount at the auction sale, with the consequence that they ran the risk of competition, and the results of the sale were subject to report to and confirmation by the court. In both cases the sale was at a price less than the secured debts. (See the *Boyd* case, 228 U. S. 482, 490, 491; and the *Kansas City* case, 240 U. S. 166, 173.)

The question before this Court was whether the auction sale, valid as between the parties and the public generally, was a bar to pursuit of the assets by non-assenting unsecured creditors. What this Court held was that *not even the auction sale was any such bar* where the non-assenting unsecured creditors had been tendered no fair equivalent for their proportionate interest.

In the present case, there was no public sale at all, and certainly there was no inventory, appraisal, advertisement and upset price. Nothing was paid or intended to be paid into the treasury of Morris White, Inc. There is nothing in the opinion of this Court in either of these cases that such a sale with such accompaniments can be dispensed with on mere tender to non-assenting creditors of stock or other securities of the new company. Surely, at the very least, non-assenting creditors are entitled to a public sale with the accompaniments of advertisement, inventory, appraisal, and upset price. At the very least the reorganizing group must be required

to go into the open market and subject their bid to open competition under the safeguards of a public auction. At the very least the non-assenting creditors are entitled to the chance that such an auction will develop into a genuine sale with price and terms commensurate with the actual value of the property. At the very least the non-assenting creditors are entitled to their day in court on the subsequent effort of the reorganizing group to have such a sale judicially confirmed.

The reason why in the *Boyd* case the actual auction sale provided no cash for the non-assenting unsecured creditors was that the price bid by the reorganizing group pursuant to the reorganization plan "was less than the secured debts" (228 U. S. 482, 490). Since the reorganization plan combined the old secured creditors and the old stockholders, this Court held that the sale was as against unsecured creditors "a mere form" whereby nothing actually had been changed.

In the present case, however, an actual sale would have required the reorganizing group to pay some cash because there were no mortgage bonds at all and all creditors would have had an equal right to seek a pro rata share out of the purchase price.

By dispensing altogether with any such sale the District Court deprived the non-assenting creditors of these rights and of the well-grounded chance that by a public sale accompanied with proper advertisement, inventory and appraisal and subject to subsequent confirmation by the court a substantial price commensurate with the real value of the property would have been realized.

(2) There is nothing in the *Boyd* and *Kansas City Railway* cases, by way of dictum or otherwise, to indicate in any way that this Court held that without a public sale with proper accompaniments, the rights of unsecured creditors to follow the assets could be barred in any way.

There is nothing in either case, by way of dictum or otherwise, which supports in the slightest degree the proposition for which they are cited in the respondents' brief, to wit: (p. 26) "The power of the federal courts in equity receiverships to compel creditors to accept something other than cash in satisfaction of their claims is firmly established".

The language quoted in the respondents' brief from the opinions in those cases to the effect that if an unsecured creditor "declines a fair offer, he is left to protect himself as any other creditor of a judgment-debtor", means simply that where such a public sale has occurred and in consequence title has been transferred to the purchaser, the creditor cannot thereafter go behind the purchaser's judicially confirmed title and pursue the assets merely because the purchase was made pursuant to a "reorganization plan". All that this Court held was that such right of pursuit existed only where such reorganization plan does "recognize and preserve any interest of the stockholders without also recognizing and preserving the interest, not merely of the mortgagee, but of every creditor of the corporation" (228 U. S. 482, 505).

In short, nothing said by this Court in either of those cases even intimates that without such a public sale with proper accompaniments a court of equity may, by mere fiat, cut off and nullify the contractual rights of creditors and substitute for them stock or securities in some other venture.

(3) In the present case, there was really no sale at all,—certainly no public sale accompanied by inventory, appraisal, adequate advertisement and upset price. The decree of the District Court did not undertake to appraise, fix or determine either the identity or the value of the assets of the defendant corporation (R., 151). It made no inventory or appraisal and referred to none. It fixed no upset price. It referred to a "purchase" but

such purchase was, to use the language of the *Boyd* case (p. 506), "a mere form". The decree slightly "changed the name but not the relation" (p. 507); and "the circumlocution did not better" the title of Morris White or his new corporate embodiment as against non-assenting creditors (pp. 506-7).

(4) The other railroad cases cited by respondents do not in any way dispense with the necessity of a public sale or do not at all sustain what the respondents assert to be (p. 27) "the power of the federal courts in equity receiverships to compel the creditors to accept something other than cash in satisfaction of their claims". All that they hold is that where there has been such a public sale a creditor cannot go behind the judicially confirmed title of the purchaser and follow the assets simply because the purchase was made pursuant to a plan of reorganization unless such plan preserves the interest of the stockholders without fairly recognizing those of the unsecured creditors.

The *Phipps* case, 284 Fed. 945, may be the sole exception. Undoubtedly that decision was influenced by the fact stressed in the opinion that the insolvent was a railroad company, with the consequent public interest in keeping it going. The constant assertion in that opinion that judicial sales were unnecessary because in the *Boyd* case and the *Kansas City* case this Court held that the reorganization plans "were voidable by creditors, notwithstanding such judicial sales thereunder" (p. 952), is, we submit, a curious perversion of the decisions of this Court. This Court did not hold that title could be transferred otherwise than by a public sale, but merely that *notwithstanding the transfer of title by judicially confirmed public sale*, the non-assenting creditors could, under certain circumstances, follow the assets in the hands of the new corporation.

The decision in the *Phipps* case stands alone and has been regarded as one of very doubtful validity. See

Legislative Basis of Corporate Reorganization, 80 Penn. Law Review, 579, 583. In *Harding* v. *American Sumatra Company*, 14 F. (2) 168, the court referred to the decision in the Phipps case as follows (p. 169):

> "There was no judicial sale in the case last cited and no transfer of the assets to another corporation, but a mere adjudication that the creditors and stockholders must take what was provided in the reorganization, or nothing, notwithstanding that the reorganization was arranged for while the court was holding them off from asserting their ordinary legal rights. *This is a stretching of equity power beyond everything previously known, and quite beyond the intimations in the Boyd* case, at page 508 (33 Sup. Ct. 554) repeated in *Kansas City R. R.* vs. *Central Union Trust Co.*, supra. To deprive a creditor of his usual remedies and force him into membership in the corporation which he only credited seems to be *of very dubious correctness*, however convenient and cheap it may be to reorganizers, and however justly disappointing to recalcitrant minorities, who may be trying to force the majority to buy them out to get rid of them."

The *Phipps* case suggests two additional considerations. In the first place, if an unsecured creditor can be deprived of his right to cash as in the *Phipps* case by mere fiat of a court of equity, there is no reason why, in a similar case, the same rule should not apply to an unsecured creditor such as a bondholder. In the second place, even if, as claimed in the *Phipps* case, "judicial sales are futile" in the case of a large railroad, such as Chicago, Rock Island and Pacific Railway Company, no such generalization can be made concerning judicial sales of the assets of industrial corporation of small or moderate size. This Court evidently felt uncertain about the correctness of the *Phipps* decision, for it granted a writ of certiorari (261 U. S. 611); but the case was finally dismissed by stipulation of counsel (262 U. S. 762).

(5) The respondents' brief concedes that it can cite no precedent at all for its proposition that in an equity receivership of *an industrial corporation* the court has "power to compel creditors to accept something other than cash in satisfaction of their claim."

The respondents contend that if such a power exists in the case of a public utilities corporation, it should also exist in the case of a private industrial corporation. Respondents, however, overlook that a quasi-public corporation (such as a railroad) is outside the bankruptcy law, and therefore its insolvency administration must be in equity or be nowhere; and that one who loans money or credit to a quasi-public corporation may possibly be said to have affected it with a public interest and to subject it in part to the public's proprietary interest in the enterprise as represented by the public franchises. (See pp. 26 and 27 of our main brief.)

This very distinction has been drawn during this very month by this Court in *Shapiro* v. *Wilgus* (decided December 5, 1932) where, speaking for this Court concerning so-called friendly receiverships at the suit of simple contract creditors, Mr. Justice Cardozo said:

> "This (appointment of receivers in such cases) is done not infrequently where the defendant is a public service corporation and the unbroken performance of its services is in furtherance of the public good. *Re Metropolitan Railway Receivership,* 208 U. S. 109, 111."

In the present instance, the defendant corporation was subject to the Bankruptcy Act, and a sale of its assets was required by that Act prior to any distribution to creditors and stockholders.

In making these observations, we in no way abate our claims that even in the case of quasi-public corporations there is no such power in a court of equity as the respondents claim; and that the White offer grossly violated "the fixed principle" established by the *Boyd* case.

(6) The respondents argue (p. 33) that "our present regime of 'big business'" and the present depression should cause a court of equity suddenly to clothe itself by judicial fiat with the power, never before exercised, to nullify the contractual rights of creditors in the case of insolvent industrial corporations.

In other words, the respondents seem to think that the era of "big business" on the one hand and the present financial depression on the other may collectively or separately be regarded as now affecting investments in industrial enterprises with that element of public interest which heretofore has enabled the law and the legislatures to treat quasi-public corporations somewhat differently than industrial corporations. Such a doctrine would have startling consequences and revolutionize much well-settled constitutional law.

What the respondents really mean is that in the case of industrial corporations, the courts, through equity receiverships, should go beyond the settled power to provide a moratorium in proper cases and proceed to a wholesale nullification.

But the respondents do not tell us where the courts would get authority for so sudden an assertion of so new a power. We do not see how it could possibly come into existence until after an act of Congress following an amendment of the Constitution; and its disastrous consequences to the credit of industrial corporations is obvious enough. (See our main brief, pp. 27, 28).

Nor does it follow that the existing rule enables "a single creditor" (as the respondents contend, p. 33) "to destroy such enterprises by forced liquidation for cash." The reorganizing group of creditors need not provide at the auction sale any net amount of cash greater than necessary to pay the expenses and to pay the non-assenting creditor his proportionate share of the proceeds of such sale. The risk that they run is that some one will compete with them in the bidding; but the benefit of just

such competition is the contractual right of every creditor and a requirement of sound public policy.

Furthermore, if the "depression" is to be considered, how about the need of these surety companies, and indeed of any other non-assenting creditors, to a speedy liquidation in cash of their claims? It may be disastrous to them to receive nothing but paper on which nothing can presently be realized. Again, such paper is not, under the laws of the State of New York, lawful investment for surety companies and would not be passed by the Superintendent of Insurance. They will be obliged to go out of this class of business if paper of this character can be forced upon them whenever there is default by an industrial corporation.

(7) The respondents' brief declares that the courts must, under present conditions, assume special powers for "salvaging what they can out of a financial or commercial wreck" (p. 37).

This is a strange contradiction of the picture which the respondents attempt to draw elsewhere in their brief of the defendant corporation at the time when the White offer was presented. It was the consciousness by these petitioners of the fact that Morris White had indeed made of this corporation "a financial or commercial wreck" that impelled them to refuse to give up their claims and to refuse to take stock in what they deemed to be a crazy and impossible venture which speedily went into bankruptcy. (See Appendix A hereto.)

The Bankruptcy Law expresses the public policy of the United States for the liquidation "of a financial or commercial wreck"; and the respondents' brief concedes that under the provisions of that Act "a reorganization of the sort we are discussing" could be worked out (p. 36). The milk in the cocoanut is that those engineering this "friendly equity receivership" desired to avoid the sale required by the Bankruptcy Act in the case of reorganization.

(8) The reference in respondents' brief (p. 35) to the Solicitor General's report proposing a revision of the Bankruptcy Act is most unfortunate for the respondents, because an examination of the section on "corporate reorganizations" as proposed by the Solicitor General (see his report pp. 90-3) shows that it requires all the safe-guards and conditions which were absent in this case, to wit: an inventory, an appraisal, a preliminary enumeration and determination of claims, an advance judicial estimate of the true value of the property and either a sale "at not less than a fair upset price" or else an "appraisal and payment in cash of the value of the claims of the non-assenting creditors". In the latter event, adequate security for such payments must be provided in advance of the consummation of the plan. Had such procedure been followed in this case, the decree of June 15, 1931, would never have come into existence.

(9) The respondents' brief argues that the White offer presented a plan which fairly gave "recognition to creditors and stockholders substantially in accordance with the respective ranks and equities of their claims" (p. 38).

We fail to understand how such an assertion can be made. On the preceding page the respondents' brief has argued about this case as one of salvage "out of a financial or commercial wreck" (p. 37). That the picture was actually one of bankruptcy is obvious. (See our Main Brief, p. 15). Bankruptcy in fact speedily overwhelmed the new so-called reorganized enterprise under its new name. (See Appendix A hereto annexed).

What, in consequence, was the "equity" of the stockholder (Morris White) of the Morris White, Inc., on June 15, 1931? Certainly the decree then entered by the court gives us no clue to this question. It makes no appraisal, calls for no inventory, gives no value and provides not even an upset price. It is a mere collection of benevolent characterizations and prophecies (speedily

proven ill-founded) about the desirability of a "going concern" and the White offer providing "a better opportunity" and being "fair and equitable" (R., 152). A mere glance at the White offer shows that the so-called reorganization was really for the benefit of Morris White, the stockholder; and we see no necessity for adding to what we have said on this subject at pages 6-11 of our Main Brief.

(10) The respondents' brief states (p. 41):

> "Thus the consent of one of the two directors representing the preferred stock is required to give the common stock the right to elect a majority of the board of directors."

This is not the fact. The respondents have confused a provision about salaries with the matter of electing directors. The right of the common stockholders to elect a majority of the board of directors (so long as White remains active in the corporation) is repeatedly expressed and is unqualified (R., 21).

The respondents' brief further says (p. 40):

> "All the stockholders of the old corporation receive is a reversion after the creditors are paid in full."

This also is not the fact. See pages 8-11 of our Main Brief.

In all cases cited by the respondents the reorganization plan required the stockholders who went into it to provide additional capital; and the fact that they did thus subscribe new money was considered in weighing the comparative fairness of the provisions in the plan for creditors. In the present case, however, the stockholder contributed no new money at all. He was the only one in the plan who gave up nothing; and hence he had everything to gain and nothing to lose. The only payment made was by the creditors for it is they only who con-

tributed anything,—to wit: 80% of their claims. The stockholder, on the other hand, got control of the corporation; received the privilege of giving himself a salary as high as $60,000 a year; and was enabled to set aside two-thirds of the current earnings as a reserve for the common stock. See our Main Brief, pp. 7-11.

VII.

Reply to Respondents' Second Point (p. 46).

We believe that most of the arguments in the respondents' Second Point have been anticipated by us in our Main Brief.

(1) The fundamental argument in that Point seems to be that the Circuit Court of Appeals "did no more than what courts of equity have repeatedly done under the guise of fixing an 'up-set price'" (p. 54). We fail to see the fact or the relevancy of the attempted analogy.

An up-set price is arrived at by the making of a complete inventory, an honest and fair appraisal and an estimate of the minimum amount which the property should fairly bring. It starts the point at which bidding must begin. It preserves to all interested in the corporation the benefits of competitive bidding and the chance (which by proper preliminary advertisement may be quickened into a probability) that a better price will be realized. On the other hand, the course pursued by the Circuit Court of Appeals eliminates as an actuality all these safeguards, none of which were even attempted by the decree of June 15 (R., 151); and it throws upon the non-assenting creditors the prohibitive burden and expense of endeavoring to demonstrate speculatively what would have been realized under conditions not reproducible and entailing consequences no longer knowable.

A figure thus arrived at, not through the simple test of an actual sale under proper conditions but as more or less of a guess at an abstract conundrum, is not in any sense an "up-set price." It is neither "up-set" nor "price." It is not "up-set" because it is not a minimum but a maximum: it provides no opportunity for greater realization. It is not a "price" because there is no sale:

it is a mere guess as to the results of a past event which never happened.

If there ever were circumstances under which, as said by this Court in the *Boyd* case, 228 U. S. 482, 507, it was necessary to decide "*according to a fixed principle,* not leaving the rights of creditors to depend upon the balancing of evidence as to" the estimated value of the property, this is such a case. Otherwise, the non-assenting creditors have thrown upon them a burden of legal procedure and of proof which may far exceed in time and cost any possible realization; and the assenting creditors are given every inducement to claim that the actual value of the assets was far below the value upon which the capitalization of the new company was based,—an injustice and an inconsistency expressly commented on by this Court in the *Boyd* case (pp. 507-8).

(2) The respondents' brief (p. 53) says that the Circuit Court of Appeals did no more than is proposed in the new Section 76 of the new Bankruptcy Act offered by the Solicitor General to Congress.

This reference is unfortunate for the respondents, because the proposed new section expressly requires an advance valuation of the property based upon proper inventories and appraisals made in advance,—a procedure to be conducted with the property before the Court and at the expense of the estate as a whole.

(3) The respondents' brief further says (p. 56) that since the assets were transferred pursuant to the decree of June 15, 1931, and the plan of reorganization then became operative, these petitioners in some way lost the rights which they otherwise were entitled to and must be confined to the very dubious and wholly theoretical privileges given them by the decision of the Circuit Court of Appeals.

This argument overlooks the fact that notice of appeal was given on June 16, 1931, and the appeal was allowed on the following day (R., 157-9). If the respondents saw fit in the face of this appeal to proceed with the so-called reorganization and to exchange their claims for securities of the new corporation, they did so with their eyes open, and it is they and not these petitioners who should suffer the embarrassments consequent upon any reversal of the decree of June 15, 1931. See pp. 33 *et seq.* of our main brief.

VIII.

The petitioners wish to make their position clear that they are appearing here in behalf of themselves and not in behalf of others, and that they are asking a reversal as to themselves. In short, the petitioners ask for a reversal with affirmative directions that they be allowed to recover their claims in full, just as the non-assenting creditors were allowed to recover their claims in the *Boyd* case and in *Shapiro* v. *Wilgus,* decided Dec. 5, 1932 (see our Main Brief, p. 33, et seq.).

IX.

With the Court's permission, we will be pleased to hand up, as an addendum to our reply brief, such parts of the subsequent proceedings in *Coriell* v. *White* and in the Handbags and White Holding Co. bankruptcy proceedings as we believe essential to a proper perception of the realities of this case, with the right reserved to our adversaries to hand up such parts as they deem essential on their side.

Dated New York, N. Y., December 14, 1932.

CHARLES H. TUTTLE
of New York

GREGORY HANKIN
of Washington

SAUL S. MYERS
of New York

Counsel for Petitioners.

APPENDIX A.

Adjudication of bankruptcy as to Morris White Handbags Corp.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* MORRIS WHITE HANDBAGS CORP., *Alleged Bankrupt.*	Invol. Pet. filed— April 13th, 1932. IN BANKRUPTCY No. 53927 Bankrupt's address: 621 Sixth Ave., New York City.

At New York City, in said District, on the 29th day of April, A. D. 1932, before the Honorable FRANK J. COLEMAN, Judge of the said Court in Bankruptcy the petition of SOLOMON J. SALWEN, NATHAN SALWEN and SIMON SALWEN, copartners doing business as SALWEN PAPER CO., et al., that MORRIS WHITE HANDBAGS CORP., be adjudged bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, and the said alleged bankrupt having appeared and consented to adjudication the said MORRIS WHITE HANDBAGS CORP., is hereby declared and adjudged bankrupt accordingly.

AND IT IS FURTHER ORDERED that the said bankrupt file schedules in triplicate as required by law within ten days from the date hereof.

AND IT IS FURTHER ORDERED that the said matter be referred to P. B. OLNEY, JR., ESQ., one of the referees in

bankruptcy of this Court to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the bankrupt shall attend before said referee on the 4th day of May, 1932, at 10 o'clock a. m., and thenceforth shall submit to such orders as may be made by said referee or by the Court relating to said bankruptcy.

WITNESS, the Honorable FRANK J. COLEMAN, Judge of the said Court, and the seal thereof, at the City of New York, in said District, on the 29th day of April, A. D. 1932.

CHARLES WEISER (Sgd)
Clerk.

APPENDIX B.

Decree directing sale of the tangible assets of Morris White Handbags Corp. for $53,850.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* THE MORRIS WHITE HANDBAGS CORP., Bankrupt.	IN BANKRUPTCY No. 53927

Upon reading and filing the application of the Irving Trust Company, as trustee herein, made on or about the 25th day of May, 1932, and the order to show cause dated the 25th day of May, 1932, and due notice having been given as provided in said order and by Section 58 of the Bankruptcy Act and by the rules of this Court and upon the appraisal heretofore duly filed herein, the inventory of the Irving Trust Company as Receiver duly filed herein and all the proceedings heretofore had herein and the said meeting provided for in said order to show cause having duly taken place on the 6th day of June, 1932, before Hon. Peter B. Olney, Jr., Referee in Bankruptcy, at his office No. 19 Rector Street, Borough of Manhattan, City of New York, as provided in said order, and the said sale having been made subject to the terms of sale dated June 6th, 1932, as read and filed at said meeting, and the offer of Human Cuttler, in the sum of $53850, being the hignest offer received, and no objection having been made, and it appearing that it is to the best interest of this estate to accept said offer,

Now, on motion of Proskauer, Rose & Paskus, attorneys for the Trustee, it is

Ordered that the said sale of all of the right, title and interest of Irving Trust Company, as Trustee of the above named bankrupt and only as Trustee in and to the goods, wares, merchandise, raw material, furniture, fixtures and machinery belonging to the estate of the said bankrupt and as contained in the inventory of the Irving Trust Company, Receiver, duly filed herein on or about May 10th, 1932, and marked therein Schedule A, lots 1 to 597 inclusive, to the said Human Cuttler for the sum of $53850.00, and the said terms of sale be and the same hereby are in all respects confirmed; and it is further

Ordered that the Irving Trust Company, as Trustee herein be and it hereby is authorized and empowered to make, execute and deliver any and all documents and to do any and all other acts that may seem advisable to it to carry into effect the said sale hereby confirmed; and it is further

Ordered that the said sale of the said property be and it hereby is directed to be and is hereby deemed to be free and clear of all liens and claims, if any, of any creditor, the United States, Collector of Internal Revenue for the Second District of New York, the State of New York, the Department of Taxation and finance of the State of New York or any other person or corporation and that all such liens or claims, if any, in, to or on the said property or any part thereof be and the same hereby are transferred to the proceeds of the sale; and it is further

Ordered that for the purpose of determining what sum of money shall be allocated to each item or lot of property as contained in Schedule A of the inventory of Irving Trust Company, Receiver, duly filed herein and

marked thereon as lots 1 to 597 inclusive, the sale of which is hereby confirmed, each item or lot of property shall be deemed to be worth the same percentage of the appraised value as contained in the appraisal duly filed in this proceeding that the total sale price bears to the total appraised value of the said property, the sale of which is hereby confirmed; and it is further

ORDERED that the marshalling of the proceeds of the said sale be and it hereby is reserved for the further order and disposition of this Court; and it is further

ORDERED that the segregation of the assets belonging to this estate as contained in the inventory of the Irving Trust Company, Receiver duly filed herein into property of Morris White, Inc., which property was transferred to The Morris White Handbags Corp., the bankrupt herein, and into property of The Morris White Handbags Corp., the bankrupt herein, which property was not transferred to The Morris White Handbags Corp. from Morris White, Inc. be and the same is hereby approved and confirmed.

Dated, New York, June 6th, 1932.

PETER B. OLNEY, JR.,
Referee in Bankruptcy.

FILE COPY

APR 11 193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 8

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*, constituting a Committee of Creditors of Morris White, Inc.,
Respondent (Appellee Below).

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR REVIEW OF ORDER AWARDING THE PAYMENT IN CASH TO PETITIONERS OF ALIQUOT SHARE OF DEFENDANTS ASSETS.

VALERIA E. CORIELL,
MORRIS WHITE, INC.,
IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.

MICHAEL HOLLANDER, *et al.*,
constituting a Committee of
Creditors of Morris White, Inc.
Respondents.

JOSEPH GLASS,
JEROME WEINSTEIN,
CHARLES B. MCINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors
of Morris White, Inc.,
Respondent (Appellee Below).

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the Respondents in Opposition to Petition for Review of Order Awarding the Payment in Cash to Petitioners of Aliquot Share of Defendants Assets.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 251-266) is reported in 54 Fed. (2d) 255. The opinion of Judge Knox in the District Court (R. 193-195) is not reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals (order for mandate) was entered November 23, 1931 (R. 267). The petition for writ of certiorari was filed February 23, 1932.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Preliminary Statement.

Two separate petitions are pending herein upon two separate and distinct records. One is a petition to review the order of the Circuit Court of Appeals for the Second Circuit, which affirms an order of the United States District Court for the Southern District of New York, dated June 3, 1931, appointing Irving Trust Company as permanent Receiver in Equity of the defendant, Morris White, Inc. The other is a petition for review of the order of the Circuit Court of Appeals for the Second Circuit which, in substance modifies an order of the said District Court dated June 15, 1931 approving the offer made for the purchase of the assets of the defendant, Morris White, Inc.

The separate petitions present separate and distinct questions of law and fact. The separate questions raised by the separate petitions will be considered separately. Much of the matter contained in the instant petition and brief in support thereof has no bearing upon the issues before this Court upon the instant petition.

A motion is about to be made to dismiss both petitions upon the ground that the petitioners have waived all right of review. The order of the said Circuit Court, dated Novem-

ber 25, 1931, provides (Petition, p. 6) that a special master be appointed to appraise the value of petitioners' claims, ascertain the value of the defendant's assets as if sold at public sale and award petitioners their respective *aliquot* shares of the ascertained sum that would have been realized upon such sale of said assets, and that such amount be paid to petitioners in cash. The petitioners, after the signing of the order of the District Court upon the order for the mandate sought to be reviewed, proceeded with proof before the special master named in that order and participated in all hearings before that Special Master, *without objection*. By so doing, they waived all right to object to either of the orders now sought to be reviewed.

Statement.

On April 6, 1931, Irving Trust Company was appointed as temporary receiver in equity for the defendant Morris White, Inc. The facts leading to the appointment of an equity receiver herein are set forth in detail in pages 3 to 5 of respondents' brief in opposition to petition for review of the order making the receivership permanent. The Court is respectfully referred to said brief. A meeting of creditors was called by the receiver (R. 27, 111) and was held on April 14, 1931. Creditors with claims in the total amount of $717,000 were represented at the hearing (R. 27). A creditors' committee of nine members was elected by unanimous consent of all creditors present (R. 27, 89-91). The members of the committee directly represented claims of approximately $600,000 (R. 27, 112). A representative of the National Surety Company—the leading petitioner—became a member *ex officio* at the suggestion of the committee (R. 112) and participated in all the deliberations of that committee (R. 112, 183). The creditors' committee, after appraising the assets, proceeded to draft a reorganization plan, the terms of which were embodied in an offer made by Lily White dated April 29, 1931 (R. 26-58). On petition of the

receiver, an order was signed, dated May 12, 1931, directing all creditors and any and all other persons interested to show cause at a hearing to be held on the 26th day of May, 1931, why the offer made by Lily White, dated April 29, 1931 "should not be accepted and approved by this Court and **at such time and place to consider and act upon any other offer or offers which may then be made"** (R. 24, 25). The order directs the receiver to mail a copy thereof to all creditors of the defendant and to all parties interested, known to the receiver, on or before May 12, 1931 and **to publish in the New York Times on or before May 15, 1931, a notice stating briefly the provisions of the order** (R. 25). It is stipulated on the record by petitioners **"that the receiver gave due notice of hearing pursuant to the terms of the foregoing order"** (R. 25). Following publication of the notice, several prospective purchasers examined the assets (R. 188). **The only bid made for the defendant's assets was the one approved by the District Court.** The terms of the offer as submitted to the Court were modified pursuant to the direction of the District Judge (R. 227-230). The offer as finally approved by the District Court (R. 226-231), provides for the transfer of all of the defendant's assets, less the amount required to satisfy the obligations of the receiver and the fees and expenses of administration, to a corporation to be organized. This corporation is referred to as the New Corporation (R. 33, 34). The fees and allowances of the receiver and the receiver's counsel and all other allowances payable out of the assets of the estate are expressly made subject to the approval of the Court (R. 228). Creditors are to receive payment of 100% of their allowed claims in the following manner: 20% in notes of the New Corporation and four notes of 5% each, payable at intervals of six months commencing January 1, 1932; and 80% in preferred stock of the New Corporation (R. 43, 44). Such preferred stock is to be issued only and solely to creditors of the defendant (R. 34). In the event of default in the payment of any of the said notes all of such notes at the option of each holder

thereof, become due and payable (R. 44). The holders of preferred stock are entitled to cumulative dividends at the rate of 6% per annum commencing January 1, 1934 (R. 228). No dividends are payable on the common stock until all outstanding shares of preferred stock have been retired (R. 39). One-third of the operating profits of the New Corporation for any fiscal year after July 1, 1933 must be applied to the retirement of preferred stock (R. 39). The manner of computing such profits is fixed (R. 39) and such profits are to be determined by a yearly audit to be made by certified public accountants (R. 39). On dissolution, the par value of the preferred stock and accrued dividends must be paid in full before any distribution is made to holders of common stock (R. 40). The holders of preferred stock are entitled as a class to elect two of the five directors of the New Corporation until the preferred stock has been fully retired (R. 36). Until the notes are paid in full, the board of directors has the sole and exclusive right to employ and fix the salaries of executives of the corporation (R. 37). Such action of the said board of directors must be concurred in by four of the five members of the board of directors (R. 37). It is a condition of the said offer that the New Corporation, before the transfer of the assets of the defendant, obtain the release of the receiver from all claims of the Government of the United States and of the State of New York (R. 43). The New Corporation must file a notice of appearance submitting itself to the summary jurisdiction of the Court for the purpose of enforcing performance of its obligations under the terms of the offer (R. 49).

The plan of reorganization had been unanimously approved by the creditors' committee which directly represented claims of approximately $600,000 (R. 112). Upon the hearing, approval of the plan was expressed by the Government of the United States which had filed a claim for $100,000 (R. 81, 157). The State of New York, with a claim for $57,000, favored the plan (R. 152). The landlord, Vincent Astor, an unsecured creditor in the sum of $17,000 was "convinced it

is to the best interests of the creditors to accept this offer" (R. 104). **Creditors** (R. 92, 93, 141, 154-157, 193) **with claims of $860,000 affirmatively voiced their approval of the plan.**

The Court specifically invited an expression of opinion from the creditors opposing the plan (R. 139). **Of approximately 250 creditors of defendant** (R. 138) **only the petitioners, five in number, opposed the plan.**

The petitioner, Herman Loewenstein, is a merchandise creditor with a claim of $5,600 (R. 102, 103). The petitioner, G. Levor & Co. Inc., is a judgment creditor with a claim of some $4,500 (R. 101). The various surety companies had issued policies of credit insurance to certain creditors of Morris White, Inc., and were subject thereon to a liability not in excess of $92,000 (R. 256) upon which there had been paid approximately $19,000 (R. 256).

On June 15, 1931, the Court entered an order approving the offer made pursuant to the plan of reorganization, subject to the modifications provided in the said order (R. 226-231). In its decree, the Court made the following finding of fact:

> "3. **No offer other than said offer of Lily White dated April 29th, 1931 for the purchase of the assets of the defendant and of the Receiver's right, title and interest therein has been made."**

From that order the petitioners appealed to the Circuit Court of Appeals.

The gist of petitioners' objections in the Circuit Court of Appeals is stated in the opinion of that Court as follows (R. 257):

> "The question presented to us is whether these minority creditors are obliged to accept the plan, taking stock and notes in place of cash, and be contented to wait the outcome of this new venture in the hope that some day the preferred stock will be redeemed and payment of their notes made. Have the appellants been deprived of their rights as creditors by this order?"

The Circuit Court of Appeals held that the order of the District Court, in so far as it deprived objecting creditors of the payment in cash of their pro rata interest in the defendant's assets, was improper, and reversed the order to that extent. It held (R. 264-265):

> "An outstanding circumstance is the willingness of the majority of creditors to proceed with this reorganization, expressing the view, as they did in the court below, that the rehabilitation of White's business gave the best promise for the payment of their debts. They willingly consented to the transfer of all the corporation's assets, deferring the payment of their debts for a sufficiently long time to warrant the expectation of payment of the notes and redemption of the preferred stock. But the minority creditors, appellants, insisting upon the right to share immediately in the proceeds of a forced sale of the corporation's assets, have dissented. Their rights must be protected. They are ordinarily entitled to a public sale with competitive bidding, the assets to be sold to the highest bidder. They have a just claim to their proportionate share of the price which would have been realized at such sale after deduction of administration expenses. If a court of equity can protect these rights and at the same time carry out the wish of the other creditors, who favor the plan of reorganization, it should be done. The reorganization plan has been put into operation, and creditors, excepting the appellants, are content to have it proceed. We think both may be protected."

The Circuit Court of Appeals has directed that the appellants be paid their distributive share of the assets in cash (R. 265-266).

> "The appellants will be fully protected by having an appraisal of the value of their respective claims made before a master, to be appointed, who will take an account of the assets and liabilities of Morris White, Inc., ascertaining the value of the assets as if sold at a public sale. * * * In this way, from the ascertained sum of money that would have been realized, had a sale taken place, the appellants may be awarded their aliquot

> shares of the assets. This sum must be paid in cash, or, at the option of each of the appellants, the preferred stock and notes offered to them may be valued as of the date the reorganization plan became effective, and that sum paid in cash to them or either of them. * * * If payment is not thus made in cash, the several amounts which appellants are found entitled to may be collected by a sale of the property transferred to the new corporation. * * * There will thus be preserved to appellants their right to payment in cash, and it removes the objection they properly raise. The remaining creditors, satisfied with the plan, are then free to proceed with its operation."

The order of the Circuit sought to be reviewed provides (R. 268):

> "that the order of said District Court be and it hereby is reversed with costs, and cause remanded to the District Court for further proceedings in accordance with the opinion of this court."

Argument.

I. The order of the Circuit Court of Appeals sought to be reviewed relieves objecting creditors from acceptance of the reorganization plan and awards to petitioners the payment in cash of their respective aliquot shares of defendant's assets. The alleged unfairness of the reorganization plan, insofar as petitioners were affected, were eliminated by the order of the Circuit Court. The fairness of the reorganization plan is therefore not before this Court.

II. The procedure decreed by the Circuit Court of Appeals for the determination of the amount to be awarded and paid to petitioners in cash is fair, practical and proper.

I.

The fairness of the plan of reorganization is not in issue. That plan by the decree of the Circuit Court of Appeals sought to be reviewed is binding only upon those creditors who, to quote the Circuit Court, "are satisfied with the plan." The dissenting creditors are not compelled to accept stock or notes. Petitioners, by the order of the Circuit Court of Appeals sought to be reviewed, are to be paid their distributive share of the defendant's assets in cash. They have no greater right, either in an equity receivership or in a bankruptcy proceeding. The assets of an insolvent corporation, whether administered in equity or in bankruptcy, constitute a fund for the benefit of *all* creditors and all creditors are entitled to share *ratably* therein in accordance with their respective claims against the insolvent.

Under the order of the Circuit Court of Appeals the petitioners get precisely what they would have received if the order of the District Court had never been entered, and a sale for cash had been had and are in no way prejudiced. Assuming even that assenting creditors were prejudiced by the order of the District Court and the refusal of the Circuit Court to completely reverse it, their rights are not here on review and that question is academic on this application.

The petitioners contend at page 6 of the petition that the Circuit Court of Appeals erred in holding that the petitioners were limited to an aliquot share in cash of the sum ascertained by the Special Master to be the realizable value of the property of Morris White, Inc. at a public sale as of June 15, 1931, or at their option, an aliquot share in cash equivalent to the value of the preferred stock and notes offered under the reorganization plan. Not one of the authorities cited at page 7 of the petition supports this contention. There are no other authorities cited, either in the petition or in the brief, in support of that contention. *None can be cited.*

Neither upon principle nor upon authority can petitioners make any meritorious claim to more than that which has been awarded to them by the decree of the Circuit Court of Appeals which petitioners seek to review.

II.

The Circuit Court of Appeals has decreed that the petitioners be paid in cash their aliquot share of the defendant's assets. It must be presumed, since there is no indication to the contrary, that a fair and proper method of proof will be followed in ascertaining the amount to be paid in cash to the petitioners for their protection. Pending the determination of the Special Master, the Circuit Court of Appeals has imposed a lien upon the assets transferred to the new corporation and has provided that, in the event payment is not made, these assets be sold (R. 265) to satisfy petitioners' claims.

In the event that the rules of proof adopted by the Special Master are improper, petitioners' remedy is by an appeal from the order entered on the Special Master's report. The question as to whether or not a fair and proper determination has been made of the respective amounts to be paid to the petitioners in cash must, and can only be, raised after a determination by the Special Master.

There is nothing inherent in the procedure decreed by the Circuit Court of Appeals which prevents a fair determination of the respective amounts to be awarded to petitioners as their aliquot shares of the defendant's assets, nor does such procedure impose any undue burden upon petitioners. Petitioners are required to prove their claims before the Special Master. This they would be required to do in any event. The Special Master is directed to ascertain the amount of liabilities of the defendant. This presents no difficulties and must be done in any event. A determination of the expenses of administration by the Special Master, likewise, fails to present any problem. The only question raised by petitioners is the ability of the Special Master to ascertain "the value of

the assets as if sold at a public sale" (R. 265). This presents a simple question of fact, which is not unique or extraordinary. Similar questions are presented in the every day business of the court. Upon an application to vacate a sale in bankruptcy upon the ground of inadequacy of consideration the Court is called upon to determine the value of the assets at the date of sale. Under statutory provisions, which exist in practically every State, stockholders who oppose a sale of the assets of the corporation may, subsequent to the date of sale, obtain an appraisal of the value of their interest in the assets of the corporation at the date of the sale, and claim that amount in cash. Similar statutory provisions afford similar rights to stockholders who object to corporate consolidations and mergers. Indeed, in the ordinary case for breach of contract of sale, the Court often determines the market value of the goods at a date several years antecedent to its determination. Hence, a determination by the Special Master of the amount which would have been realized upon a public sale of the assets on June 15, 1931 presents no unique or extraordinary problem. In the event that there are deficiencies of proof, the Special Master will apply the appropriate rules of presumption. If he fails to do so, petitioners' remedy is by way of an appeal from the order to be entered on his report. Petitioners have no right to anticipate error by the Special Master.

Whether or not any bids whatsoever would be received, in the event that a new sale of the assets were decreed, is highly speculative. **In accordance with the order of the District Court, the Receiver published notice in the New York Times that a hearing would be held to consider all offers for the purchase of the defendant's assets** (R. 226). **Several prospective purchasers made inquiries, but upon the hearing there were no bids, and the District Court found as a fact** (R. 226)

> "3. **No offer other than said offer of Lily White dated April 29th, 1931 for the purchase of the assets of the defendant and of the Receiver's right, title and interest therein has been made.**"

The petitioners had notice of this hearing and appeared thereon and made no bid. The absence of bidders may be explained by the fact that the assets were subject to a lien of the United States Government for unpaid taxes, for which a claim of approximately $100,000 has been filed.

The questions which petitioners urge as of public importance and novel are not involved on this application. While such questions might have been involved before the Circuit Court, the decision of that court gave to petitioners the rights which they claim were denied them by the order of the District Court. Any original error of the District Court is therefore now purely academic insofar as petitioners are concerned, and only abstract isues are therefore sought to be presented by this application. While such abstract issues may be novel and their determination of public interest, they are not before this Court on this petition.

The instant case is not one which is entitled to the consideration of this Court under the rules governing the issuance of writs of certiorari.

Respectfully submitted,

VALERIA E. CORIELL,
MORRIS WHITE, INC.,
IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.

MICHAEL HOLLANDER, *et al.*,
constituting a Committee of
Creditors of Morris White, Inc.,
Respondents.

JOSEPH GLASS,
JEROME WEINSTEIN,
CHARLES B. MCINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Of Counsel.

APRIL, 1932.

FILE COPY

MAY 2 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

Nos. [redacted] 8

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*, constituting a Committee of Creditors of Morris White, Inc.,
Respondent (Appellee Below).

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN REJOINDER TO PETITIONERS' REPLY BRIEF.

JOSEPH GLASS,
JEROME WEINSTEIN,
CHARLES B. MCINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Counsel.

THE BALLOU PRESS NEW YORK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

Nos. 726 and 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors
of Morris White, Inc.,
Respondent (Appellee Below).

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN REJOINDER TO PETITIONERS' REPLY BRIEF.

Preliminary Statement.

Upon submission of the petitions for certiorari in the above cause, petitioners filed a 28-page brief in reply. Rejoinder

thereto is required to correct the misapprehensions which may result from permitting misstatements of law and fact contained in said reply brief to go unchallenged.

In violation of the rules of this Court, petitioners' reply brief repeatedly asserts facts without reference to the record; makes references to the record which fail to support the assertions purporting to be based thereon; and discusses matters patently outside of the record (reply brief, pp. 10-16). A detailed recital thereof would unduly encumber this brief in rejoinder.

Petitioners' brief in reply refers to the filing by petitioners with the Clerk of this Court of copies of a claim filed in, and a rule to show cause issued by, the District Court subsequent to the entry of the orders sought to be reviewed by the present petitions (Reply Brief, 10). No copies of these papers have been served by petitioners upon respondents. Such papers are not part of the record. If such presentation of alleged facts outside the record were to be permitted, it would be necessary to present to this Court the complete record upon the return of said rule to show cause. This Court would then be called upon to review the action of the Court below upon a record different from the one upon which the Court below acted in rendering its decision.

We believe that orderly practice requires that the arguments before this Court be based on the facts before the Court below and that the issues before this Court be not enlarged by the introduction of facts not before the Court below; and we therefore respectfully request that all statements in petitioners' reply brief which are not supported by correct and appropriate reference to matters in the record be disregarded in accordance with the rules of this Court.

No. 726.

1. Brief in rejoinder to petitioners' reply brief upon petition for review of order making receivership permanent.

A. *The recital in the decree making the receivership permanent that such decree was entered without objection is conclusive and may not here be questioned.*

Petitioners (Reply Brief, 2-4) challenge the veracity of the recital contained in the order of the District Court (R. 209), viz: "there being no opposition to the making of the said receivership permanent and no application for any modification of said order". Petitioners have at no time made any application to modify that recital. It cannot be challenged upon appeal.

> *Ex parte Spiess,* 123 U. S. 131, 182; 31 L. Ed. 80, 91; *Evans* v. *Stettnisch,* 149 U. S. 605, 607; 37 L. Ed. 866, 867.

Upon the appeal to this Court in *Ex parte Spiess, supra,* the correctness of recitals of the record as to the proceedings had below was challenged. This Court ruled at page 182:

> *"If this is not in accordance with the fact, the record must be corrected below, not here."*

The foregoing rule of law makes it unnecessary to dwell upon the fact that the objections to the decree to which petitioners refer in their reply brief (p. 3), were first asserted in an affidavit filed (R. 198) *after the District Court had rendered its decision* (R. 195); or upon the fact that the representative of the National Surety Company, the leading petitioner, admitted his participation as a member *ex officio* of the Creditors' Committee, and stated upon the hearing in the District Court *"It is true I attended every meeting"* (R. 181).

B. *The Court had jurisdiction to make the decree.*

Jurisdiction in the District Court to make the receivership permanent is attacked in petitioners' reply brief (pp. 4-17) upon the following grounds: (1) That solvency of the defendant is an essential requisite of equitable jurisdiction upon a creditors' bill to administer the defendant's assets. (2) That upon a creditors' bill, equity is without jurisdiction unless complainant has exhausted legal remedies by judgment and a return of execution thereon unsatisfied. (3) That the administration of defendant's assets in equity unlawfully impaired petitioners' rights under the Bankruptcy Act.

The first two of petitioners' contentions are completely answered by this Court's opinion in *Hollins* v. *Brierfield*, 150 U. S. 371, 380, 37 L. Ed. 1113, 1115. That case directly raised the question of equitable jurisdiction in the appointment of a receiver upon a creditors bill. The Court stated:

> "* * * Defenses existing in equity suits may be waived, just as they may in law actions, and when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal * * * **the administration of the assets of an insolvent corporation is within the functions of a court of equity, and the parties being before the court, it has power to proceed with such administration.** If there was a defense existing to the bills as framed, **an objection to the right of these plaintiffs to proceed on the ground that their legal remedies had not been exhausted, it was a defense and objection which must be made in limine, and does not of itself oust the court of jurisdiction.** This doctrine has been recognized not merely in the cases cited, but also in those of *Reynes* v. *Dumont*, 130 U. S. 354 (32: 934); *Kilbourn* v. *Sunderland*, 130 U. S. 505 (32: 1005); *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530 (33: 1021). * * *"

The rule stated in *Hollins* v. *Brierfield, supra,* is not altered by the recent decisions of this Court cited at page 7 of petitioner's reply brief. In *Mathews* v. *Rodgers,* 284 U. S. ; 76 L. Ed. 271, 273 (No. 84, October Term, 1931, decided February 15, 1932), *this Court expressly recognized and accepted the distinction between a complete lack of equitable jurisdiction and the existence of defenses to the exercise of that jurisdiction.* This Court's decision in *Stratton* v. *St. Louis Southwestern Railway Company,* 284 U. S. ; 76 L. Ed. 276, 277 (No. 178, October Term, 1931, decided February 15, 1932) cites and follows *Mathews* v. *Rodgers, supra.*

Petitioners' third contention, *i. e.,* that administration in equity unlawfully impaired petitioners' rights under the Bankruptcy Act, is, both in matter of fact and in matter of law, without merit. Petitioners' repeated assertions that the defendant was insolvent within the meaning of the Bankruptcy Act are without support in the record. Petitioners' statement "with both courts finding the defendant corporation insolvent within the meaning of the Bankruptcy Act" (Reply Brief, p. 5) is *not supported by any reference to the record, and nowhere in the record can any such finding be found.* Petitioners assert (Reply Brief, p. 5) that "a state of bankruptcy was admitted by counsel for the defendant (R. 70)". At that page of the record it appears that counsel for the defendant, in colloquy with the Court and a creditor, stated:

> "There is more than ample there to pay him one hundred cents on the dollar."

Petitioners assert (Reply Brief, p. 5) that a state of bankruptcy "was apparent on the face of the financial statement such as was available" (R. 83, 84). That financial statement, which is part of the record (R. pp. 196, 197), reflects total liabilities of $1,072,000.30 and total assets of $4,116,215.04. In matter of law, as has already been pointed out (Respondents' brief in opposition pp. 11-12) the appointment

of an equity receiver did not and *could not impair* the power of petitioners to assert their rights under the Bankruptcy Act by the filing of a petition in bankruptcy.

CONCLUSION.

(1) The order, by its recitals, conclusively establishes that such order was made without objection (*Ex parte Speiss*, 123 U. S. 131, 182).

(2) Equitable jurisdiction was not ousted by petitioners' allegation that defendant was insolvent. (*Hollins* v. *Brierfield*, 150 U. S. 371, 380; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 500).

(3) Complainant's failure to obtain judgment and a return of execution thereon unsatisfied, did not deprive the court of jurisdiction but merely constituted a possible defense (*Hollins* v. *Brierfield, supra*); and the recitals of the order conclusively establish that such defense was waived.

(4) The appointment of an equity receiver did not and could not impair the right of petitioners to invoke the provisions of the Bankruptcy Act by the filing of a petition in bankruptcy.

The petition for review of the order making the receivership permanent is not entitled to consideration of this Court, under the rules governing the issuance of writs of certiorari.

No. 727.

Respondents' Brief in Rejoinder to Petitioners' Reply Brief Upon Petition for Review of Order Awarding the Payment in Cash to Petitioners of Aliquot Share of Defendant's Assets.

We will not enumerate the erroneous statements of fact contained in petitioners' reply brief upon the instant petition. The preliminary statement made in respondents' brief in rejoinder upon the petition for review of the order making the receivership permanent is here fully applicable. We omit repetition thereof.

The arguments advanced in petitioners' reply brief (pp. 18-25) in support of the instant petition, are herein considered in the order in which they are advanced by petitioners.

1. Petitioners state (Reply Brief, p. 18) that there was no sale of the defendant's assets. That statement is repudiated by the specific facts on the record, set forth in respondents' brief in opposition (pp. 4, 11). Those specific facts are nowhere challenged by petitioners. They conclusively establish that the receiver duly published in The New York Times, and served upon all creditors, notice of a public hearing to consider any offers for the purchase of the defendant's assets which might then be made, and that upon such hearing the only offer for the purchase of the defendant's assets was the one approved by the District Court.

2. Petitioners assert (Reply Brief, p. 19) error by the Circuit Court of Appeals in its reliance upon the case of *Geddes* v. *Anaconda Co.*, 254 U. S. 590, as authority for the appointment of a special master to ascertain petitioners' respective aliquot shares in the realizable value of defendant's assets upon public sale. It is the petitioners who are in error. That case was cited by the Circuit Court, not for the proposition stated by petitioners, but as authority for award-

ing to petitioners the option to claim the cash value of the preferred stock and notes offered to them under the terms of sale approved by the District Court (R. 265).

3. The statement in petitioners' reply brief (p. 20) that "any reorganization which recognizes and preserves the interests of the stockholders at the expense of creditors is invalid" and the citation of *Northern Pacific Railway* v. *Boyd*, 228 U. S. 482, as authority therefor, are accurate, but wholly without relevance. By the order of the Circuit Court sought to be reviewed, petitioners have been relieved from the acceptance of the plan of reorganization embodied in the offer approved by the District Court. In lieu of the stock and notes to be paid to assenting creditors, the Circuit Court has awarded to petitioners the payment in cash of their respective aliquot shares of defendant's assets. In so far as the reorganization plan affects the rights of assenting creditors, it provides that such creditors must be paid 100% of their claims in full before there can be any payment made to stockholders of the old corporation (R. 39, 40), and therefore wholly complies with the principle of the *Northern Pacific Railway* v. *Boyd* case, *supra*.

4. Petitioners dwell at length (Reply Brief, pp. 20-21) upon the possible errors which may be committed by the Special Master in ascertaining the realizable value of the defendant's assets upon a public sale for cash. Those errors have not as yet been committed. Petitioners have no right to assume that error will be committed by the Special Master and to appeal in advance therefrom.

5. We stated in respondents' brief in opposition (p. 9) that not one of the cases cited at page 7 of the petition supports petitioners' contention that the Circuit Court of Appeals erred in holding the petitioners were limited to an aliquot share in cash of the sum ascertained to be the realizable value in cash of the defendant's assets at a public sale as of June 15, 1931. Petitioners' reply brief (pp. 22-24) again

refers to the same authorities in support of the same contention. We here repeat our former statement with respect thereto. Those authorities hold either that under the express provisions of the Bankruptcy Act the assets in the bankrupt's estate must be sold for money (*In Re Prudential Outfitting Co.*, 250 Fed. 504; *In re J. B. and J. M. Cornell Co.*, 186 Fed. 859; *In Re Northampton Portland Cement Co.*, 185 Fed. 542); or, that the authority of a receiver of a national bank to fix terms of sale is fixed by statute (*In Re Sale of Assets of First National Bank of Florence*, 6 F. (2d) 905); or else that the lien of *secured* creditors upon the assets of an insolvent corporation cannot be subordinated to obligations created by the receiver (*In Re J. B. & J. M. Cornell Co.*, 201 Fed. 381; *Merchants Loan & Trust Co.* v. *Chicago Railways Co.*, 158 Fed. 923; *Kneeland* v. *American Loan Co.*, 136 U. S. 89; *Gay* v. *Hudson River Electric Power Co.*, 184 Fed. 689). The rulings in those cases are not disputed. They are, however, without any relevance to any of the issues here before the Court. As additional authority for their contention, petitioners now cite (Reply Brief, p. 24) the case of *B. Borchardt & Co.* v. *Yaryan Naval Stores*, 206 Fed. 366. We most respectfully refer the Court to that case. It will be found utterly without pertinence.

6. The application by the Special Master of the ordinary rules of presumption and proof to determine the amount which would have been realized upon a public sale of defendant's assets for cash is not the novel question which petitioners would make it (Reply Brief, p. 24). Similar questions are presented for determination in ordinary legal proceedings, and legal procedure has hitherto been found adequate to make such a determination (*vide respondents' brief in opposition*, p. 11). Even granting for the purposes of argument that the Court below should have ordered a sale as distinguished from an estimate, the decision of the Circuit Court of Appeals was handed down on November 16, 1931. The assets had been transferred to the purchaser on June 15, 1931, and the plan of reorganization had been put into

effect. The purchaser had continued the business of the defendant from June 15, 1931, to November 16, 1931. An actual sale as of June 15, 1931, was obviously impossible on November 16, 1931. Only an estimate was possible. The opinion of the Circuit Court of Appeals was practical rather than theoretical.

CONCLUSION.

(1) Petitioners, as creditors of the defendant, are merely entitled to their respective aliquot shares of the defendant's assets.

(2) The order of the Circuit Court of Appeals sought to be reviewed awards to petitioners the payment in cash of their respective aliquot shares of the defendant's assets.

(3) The determination by the Special Master of the amount to be awarded to petitioners in cash, on account of their respective aliquot shares of the defendant's assets, through the application of established rules of presumption and proof, does not present a problem outside the scope of ordinary legal procedure. A sale on November 16, 1931, as of June 15, 1931, of assets not in existence on the later date, was obviously impossible. The Circuit Court of Appeals prescribed the only practicable machinery possible.

The petition for review of the instant order is not entitled to the consideration of this Court under the rules governing the issuance of writs of certiorari.

Respectfully submitted,

JOSEPH GLASS,
JEROME WEINSTEIN,
CHARLES B. MCINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Counsel.

April 28, 1932.

FILE COPY

MAY 11 1932
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

Nos. [redacted] 8

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*, constituting a Committee of Creditors of Morris White, Inc.,
Respondents (Appellees Below).

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' MOTION TO DISMISS PETITIONS AND AFFIDAVIT AND BRIEF IN SUPPORT THEREOF.

JOSEPH GLASS,
JEROME WEINSTEIN,
CHARLES B. McINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Counsel.

THE BALLOU PRESS NEW YORK

Motion.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

Nos. 726 and 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors of Morris White, Inc.,
Respondents (Appellees Below).

And now come Valeria E. Coriell, Morris White, Inc., Irving Trust Company, as Receiver of Morris White, Inc., and Michael Hollander, *et al.*, constituting a Committee of Creditors of Morris White, Inc., the respondents above named, by Joseph Glass, Charles B. McInnis, Nathan D. Stern and Milton C. Weisman, their counsel, and move to dismiss the petitions for writs of certiorari heretofore filed

herein by the National Surety Company, *et al.*, the petitioners above named, for the reason that petitioners have waived all right of review by the acceptance of benefits under the orders sought to be reviewed, and for the further reason that said petitions are irregular and insufficient in that The Morris White Handbags Corp., which is directly affected by the orders sought by said petitions to be reviewed, is not named or joined as a party upon either of said petitions.

May 3, 1932.

JOSEPH GLASS,
CHARLES B. MCINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Counsel for Respondents.

Notice of Motion.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

Nos. 726 and 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors
of Morris White, Inc.,
Respondents (Appellees Below).

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Joseph Glass, sworn to the 3rd day of May, 1932, a copy of which is hereto annexed, and upon the petitions for certiorari and the printed record of the proceedings had in this cause in the United States Circuit Court of Appeals for the Second Circuit and in the United States District Court for the Southern District of New York heretofore filed by peti-

tioners above named with the Clerk of the Supreme Court of the United States, and upon the printed brief, a copy of which is herewith served upon you, we shall on Monday, the 23rd day of May, 1932 make and submit to the Supreme Court of the United States, at a stated term thereof to be held in the City of Washington, District of Columbia, the above motion to dismiss.

Dated, May 3, 1932.

JOSEPH GLASS,
CHARLES B. MCINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Counsel for Respondents.

To:
GREGORY HANKIN,
CHARLES H. TUTTLE,
SELDEN BACON,
SAUL S. MYERS,
Counsel for Petitioners.

Affidavit of Joseph Glass in Support of Motion to Dismiss.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

Nos. 726 and 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors
of Morris White, Inc.,
Respondents (Appellees Below).

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
STATE OF NEW YORK,

JOSEPH GLASS, being duly sworn, deposes and says: I reside within the Southern District of New York, in the Village of Mount Kisco, County of Westchester, State of New York.

Affidavit of Joseph Glass.

I am a member of the firm of Olcott, Holmes, Glass, Paul & Havens, counsel for Irving Trust Company, as Receiver of Morris White, Inc., one of the respondents above named, and am personally familiar with the proceedings hereinafter mentioned.

On February 23, 1932, petitioners filed in this Court two separate petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Said petitions have been docketed as numbers 726 and 727 on the calendar for the October Term, 1931. This affidavit is submitted in support of respondents' motion to dismiss both said petitions upon the ground that the petitioners, by proceeding, without objection, upon the hearings directed to be taken for their benefit by the orders of the Circuit Court of Appeals sought to be reviewed and by accepting the benefits of said orders, have waived all right to review thereof; and upon the further ground that petitioners' proceedings are fatally defective by reason of the omission of a necessary party from said petitions.

On April 6, 1931, Valeria E. Coriell, respondent above named, filed a creditor's bill against Morris White, Inc., respondent above named, in the District Court of the United States for the Southern District of New York. By order of said District Court, dated April 6, 1931, Irving Trust Company was appointed receiver of the assets of Morris White, Inc. Said receivership was made permanent by order of said District Court, dated June 3, 1931. Said order recites that there was no opposition thereto.

Said receiver, by order of said District Court, dated June 15, 1931, was authorized and directed to accept an offer for the purchase of the assets of Morris White, Inc. Such offer provides that creditors of Morris White, Inc. be paid 100% of their allowed claims in the following manner: 20% in notes, and 80% in preferred stock of The Morris White Handbags

Corp., the purchaser of said assets. Pursuant to the provisions of said order, dated June 15, 1931, the receiver assigned and transferred the assets of Morris White, Inc. to The Morris White Handbags Corp. Of the 250 creditors of Morris White, Inc., only the petitioners, five in number, objected to the acceptance of the offer.

Petitioners appealed to the United States Circuit Court of Appeals for the Second Circuit from the aforesaid orders dated June 3, 1931 and June 15, 1931. The decision of said Circuit Court of Appeals, rendered on November 16, 1931, is reported in 54 F. (2d) 255.

Said Circuit Court of Appeals, in its opinion, ruled that petitioners were entitled to the payment in cash of their aliquot shares of the assets transferred by the receiver as aforesaid, or, at their option, of the value of the notes and stock of The Morris White Handbags Corp. offered to them under the terms of sale approved by the District Court; and directed that such amounts be ascertained by a Special Master and be awarded to petitioners. It held (p. 261):

> "* * * The reorganization plan has been put into operation, and creditors, excepting the appellants, are content to have it proceed. We think both may be protected. The appellants will be fully protected by having an appraisal of the value of their respective claims made before a master, to be appointed, who will take an account of the assets and liabilities of Morris White, Inc., ascertaining the value of the assets as if sold at a public sale. * * * In this way, from the ascertained sum of money that would have been realized, had a sale taken place, the appellants may be awarded their aliquot shares of the assets. This sum must be paid in cash, or, at the option of each of the appellants, the preferred stock and notes offered to them may be valued as of the date the reorganization plan became effective, and that sum paid in cash to them or either of them. * * * If payment is not thus made in cash, the several amounts

> which appellants are found entitled to may be collected by a sale of the property transferred to the new corporation. * * * There will thus be preserved to appellants their right to payment in cash, and it removes the objection they properly raise. The remaining creditors, satisfied with the plan, are then free to proceed with its operation."

Orders entered in said Circuit Court of Appeals, remanded the cause to the District Court for further proceedings in accordance with said opinion.

Pursuant to the opinion and the mandates of said Circuit Court of Appeals upon said appeals, an order, dated February 2, 1932, was duly made and entered, after due notice of settlement to petitioners' counsel, in the District Court for the Southern District of New York. A copy of said order of the District Court is hereunto annexed, marked "Exhibit A".

That order of the District Court appoints a Special Master to take testimony and report thereon, in conformity with the opinion of the Circuit Court of Appeals. It provides, among other things, that

> "* * * the expense of the hearings before the said Special Master, including his compensation and the cost of a copy of the minutes of the Special Master shall be paid by The Morris White Handbags Corp. and shall be a charge and a lien upon its property";

Said order further directs that the respondent Irving Trust Co. pay to petitioners costs on the appeal and costs in the District Court. Such costs, which total $1305.30 have been paid by said respondent and have been received and accepted by petitioners.

Petitioners proceeded with the hearings before the Special Master named in the order of said District Court, dated February 2, 1931, without objection. The rights and benefits conferred upon petitioners by the decision and order of said

Circuit Court of Appeals and the order of the District Court entered pursuant thereto were asserted by petitioners' counsel. Petitioners made no application for a stay of the proceedings directed to be taken pursuant to said orders aforesaid.

Hearings before the Special Master were commenced on February 9, 1932, and were continued at length. Prior to February 23, 1932, more than 300 pages of testimony had been taken at such hearings. Petitioners actively participated in all such hearings. The testimony of the witnesses called by petitioners' counsel before the Special Master fills 165 pages of the record upon said hearings. Witnesses on behalf of other parties were extensively cross-examined by petitioners' counsel. A certified copy of the record on the hearings befor the Spcial Master will be filed with the Clerk of this Court.

Substantial charges were incurred for stenographic services and for the rental of space for such hearings and the Special Master became, by reason of his services upon said hearings, entitled to substantial fees.

After participation in all the hearings before the Special Master, petitioners on February 23, 1932, filed in this Court petitions for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the orders of the Circuit Court of Appeals, by which the hearings had been directed to be taken for the benefit of petitioners.

The conduct of petitioners in proceeding before the Special Master, without objection, upon the hearings directed by the Circuit Court of Appeals to be taken for the benefit of petitioners, constitutes an acceptance of the benefits of the orders of said Circuit Court of Appeals and a waiver of all right to review thereof.

The Morris White Handbags Corp., the purchaser under the order of the District Court dated June 15, 1931, is a

necessary party to any proceedings for the review of the orders affected by petitioners' applications. It has not been named or joined as a party to these proceedings.

For the foregoing reasons I respectfully ask that the aforesaid petitions for writs of certiorari be dismissed.

JOSEPH GLASS.

Sworn to before me this
3rd day of May, 1932.

ETHEL COTTER,
Notary Public.
Bronx County Clerk's No. 128
Bronx County Register's No. 31C34
New York Co. Clerk's No. 354
New York Co. Register's No. 4C198
Kings County Clerk's No. 140
Kings County Register's No. 4180
Queens County Clerk's No. 651
Queens County Register's No. 2944
Commission expires March 30, 1934

Exhibit A.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

VALERIA E. CORIELLL, Complainant, against MORRIS WHITE, INC., Defendant.	ORDER ON MANDATE IN EQUITY No. E 59-126.

This cause having heretofore come on for hearing in the United States District Court for the Southern District of New York, and a decree, dated June 15, 1931, having been entered herein approving the offer of Lily White herein, and National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co. Inc., having thereafter by an appeal procured a transcript of the record to be brought into the United States Circuit Court of Appeals for the Second Circuit, and the said United States Circuit Court of Appeals for the Second Circuit having transmitted to this Court its mandate dated December 2, 1931, by which it appears that at the October Term of said Court for 1931 the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit on the said transcript of record and was argued by counsel, on consideration whereof it was ordered, adjudged and decreed that the said order of said District Court be reversed with costs taxed at the sum of $1,175.30, and the cause be remanded to the District Court for further proceedings in accordance with the opinion of said Circuit Court of Appeals for the Second Circuit.

Exhibit A.

Now, upon reading and filing the said mandate, it is

ORDERED, ADJUDGED AND DECREED that the said mandate of said United States Circuit Court of Appeals for the Second Circuit in this cause be and the same hereby is made the judgment of this court; and it is further

ORDERED, ADJUDGED AND DECREED that the said decree of this court dated June 15, 1931 approving the offer of Lily White, in so far as it affects the rights of National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co., Inc., the appellants herein, be and the same is hereby reversed, with costs of the said appeal as taxed at the sum of $1,175.30, together with the costs in this court, taxed at ; and it is further

ORDERED, ADJUDGED AND DECREED that National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co., Inc. have judgment against Irving Trust Company, as Receiver in Equity of Morris White, Inc. for the sum of $1305.30 costs on appeal as taxed and costs in this court, and that Irving Trust Company, as Receiver in Equity of Morris White, Inc. be and it hereby is directed to pay said costs out of moneys in its possession as such Receiver in Equity; and it is further

ORDERED, ADJUDGED AND DECREED that Earl B. Barnes of 76 William Street, Borough of Manhattan, City of New York, be and he hereby is appointed Special Master herein to hear and take testimony and other evidence and to report thereon to this court, in conformity with the aforesaid opinion of said United States Circuit Court of Appeals; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall proceed with said hearings and report thereon

with all convenient speed and as rapidly as he deems it proper, in view of all the circumstances of the case; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall ascertain the several amounts of the respective claims of National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co., Inc. and make an appraisal of the realizable value of said claims as of June 15, 1931; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall take an account of the assets of Morris White, Inc. as of the 15th day of June, 1931, including among such assets all causes of action belonging to Morris White, Inc. and shall ascertain and report the then realizable value of said assets as if sold at a public sale; and shall also take account of the liabilities of Morris White, Inc., as of April 6, 1931, and shall ascertain and report which if any, of said liabilities are entitled to priority of payment; and shall also take an account of the obligations of the Receiver herein and of the expenses of administration of the estate herein incurred up to the fifteenth day of June, 1931; and shall determine through examination of officers and/or agents of the defendant and/or The Handbags Corporation, the nature, quality and amount of inventory on hand as of such dates as may be pertinent to this inquiry; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall conduct hearings and take testimony and other evidence and report as to whether or not preferences or transfers, voidable either at law or in equity, as of June 15, 1931, at the instance of any creditor or other party interested in the assets of the Morris White, Inc., have been granted by the pledging of any assets of Morris White, Inc. or other-

wise; and at the hearings before the said Special Master any creditor of Morris White, Inc. shall have the opportunity of questioning the assignment of accounts by it as collateral and of questioning any such voidable preference or transfer that may have been made; and it is further

ORDERED, ADJUDGED AND DECREED that if it is established that any such voidable preferences or transfers have been granted or made out of the assets of Morris White, Inc., said preferences or transfers are to be regarded by said Special Master as invalid for the purposes of his calculations and the amounts of said preferences or transfers are to be considered by said Special Master as part of the assets of said Morris White, Inc.; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall ascertain and report the aliquot share of the assets to be awarded and paid in cash, subject to further order of this court, to National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein, and G. Levor & Co., Inc. out of the sum ascertained to be the amount that would have been realized for the assets of Morris White, Inc., on June 15, 1931, had a public sale of said assets been held, after the deduction from said sum of such portion of the obligations of the Receiver and the expenses of administration herein as would have been properly chargeable against the estate had the assets of Morris White, Inc. been liquidated by sale, and the proceeds distributed to creditors in ordinary course, and after the deduction of the liabilities of Morris White, Inc. entitled to priority of payment; or at the option of each of them the preferred stock and notes heretofore offered to them, pursuant to said offer of Lily White, may and shall in like manner be valued by said Special Master, as of the date the reorganization plan became effective, to be

awarded and to be paid in cash to them or any of them subject to the further order of this court; and it is further

ORDERED, ADJUDGED AND DECREED that no bank or other creditor of Morris White, Inc. shall collect on any security which has been pledged as collateral and in addition thereto receive preferred stock and notes but that each bank or other creditor holding any security may agree to receive and shall receive preferred stock and notes only for such sum or sums as their respective claims exceed the realizable value of said collateral; and the said Special Master shall ascertain and report the value of the security, held by secured creditors, for all purposes, as of June 15, 1931; and it is further

ORDERED, ADJUDGED AND DECREED that the expense of the hearings before the said Special Master, including his compensation and the cost of a copy of the minutes of the Special Master shall be paid by The Morris White Handbags Corp. and shall be a charge and a lien upon its property; and it is further

ORDERED, ADJUDGED AND DECREED that the said Special Master shall give notice to all the parties hereto of the filing of his report and thereafter any of the parties may apply to this court for such further order thereon as they may be advised: and it is further

ORDERED, ADJUDGED AND DECREED that subject to the provisions of this order and the further order of this court, the reorganization plan represented by the aforesaid offer of Lily White, as modified by this order and by the order entered herein, dated June 15, 1931, be allowed to continue in operation and The Morris White Handbags Corp. be and it hereby is permitted to continue in the conduct of the business heretofore transferred to it pursuant to the terms of the aforesaid order, dated June 15, 1931; and it is further

Exhibit A.

ORDERED, ADJUDGED AND DECREED that all persons, firms or corporations which have heretofore sold and delivered goods, wares and merchandise and/or rendered services to the said The Morris White Handbags Corp. in the regular course of its business and/or which may hereafter sell and deliver goods, wares and merchandise and/or render services to the said The Morris White Handbags Corp. in the regular course of its business shall be entitled to priority of payment out of the assets of The Morris White Handbags Corp., other than such assets as were transferred to the said The Morris White Handbags Corp., pursuant to said order dated June 15, 1931, for any such indebtedness now or hereafter owing by the said The Morris White Handbags Corp. to any such persons, firms or corporations; and it is further

ORDERED, ADJUDGED AND DECREED that A. W. Copp, or such other representative as Irving Trust Company may appoint in place of said A. W. Copp, shall, at the expense of The Morris White Handbags Corp., attend daily, if possible, at the place of business of The Morris White Handbags Corp., and said The Morris White Handbags Corp. shall render to the said A. W. Copp full and complete reports, as and when requested by him, of all details of its business and affairs as the same are carried on, including therein any and all information with respect to purchases, sales, payments, receipts, salaries, rents, expenses, contracts, commitments, and any other matters or things which may in any way affect the assets or liabilities of the said The Morris White Handbags Corp.; that the said The Morris White Handbags Corp. shall give to the said A. W. Copp, or any representative named in his place, any information whatever appertaining to its affairs which the said A. W. Copp, or any representative named in his place, may request; that the said A. W. Copp, or any representative named in his place shall report to the attorneys for the National Surety Co., from

time to time as requested by them; and that Irving Trust Company shall not be under any liability whatsoever as Receiver in Equity of the defendant or otherwise for the management of the business of The Morris White Handbags Corp., or the performance by A. W. Copp, or the representative named in his place, of the duties imposed upon him by this order; and it is further

ORDERED, ADJUDGED AND DECREED that pending the entry of an order of this court upon the report of the said Special Master and for the purpose of securing to National Surety Company, American Credit Indemnity Company, London Guaranty & Accident Company, Ltd., Hermann Loewenstein and G. Levor & Co. Inc. payment by the said The Morris White Handbags Corp., out of the assets transferred to the said The Morris White Handbags Corp., pursuant to the order herein dated June 15, 1931, of the amounts which may be determined to be paid to them in cash upon their respective claims, a lien is hereby imposed upon all of the assets of Morris White, Inc., transferred to and remaining in the possession of said The Morris White Handbags Corp., pursuant to said order dated June 15, 1931; except that as to such of said assets as the said The Morris White Handbags Corp. shall hereafter in good faith transfer in the regular course of its business for fair and proper consideration, said lien shall attach to the proceeds of such transfers or successive transfers of such proceeds, and the said The Morris White Handbags Corp. is hereby enjoined and restrained, subject to the further order of this court, from transferring any of said assets of Morris White, Inc., remaining in its possession except in good faith in the regular course of its business and for fair and proper consideration, unless the said The Morris White Handbags Corp. shall file a bond or other security in such amount as may be fixed and approved by this court after hearing the parties in interest; and it is further

Exhibit A.

ORDERED, ADJUDGED AND DECREED that the Morris White Handbags Corporation having paid to Irving Trust Company herein the sum of $33,322.32, represented by it to be the amount payable by it on January 2, 1932 on account of the notes issued pursuant to the terms of the sale approved in the said decree of June 15, 1931, such payment shall not, without further order of the Court, be applied on account of said notes but shall be held by Irving Trust Company as depositary, without prejudice to any of the rights of the parties to this proceeding; and it is further

ORDERED, ADJUDGED AND DECREED that all questions not hereby disposed of are reserved for future adjudication; and that for the purpose of enforcing the provisions of this decree and for the purpose of entering such further orders or decrees as the court may hereafter from time to time determine, the term of this court is hereby extended and jurisdiction of the cause is hereby retained. This order is without prejudice to the motion heretofore made by the Equitable Life Assurance Society to set aside the aforesaid order of June 15, 1931, and without prejudice to such right as it may assert within thirty days after the filing of the report of the Special Master and the entry of an order thereon, to have its aliquot share of the assets of Morris White, Inc., paid to it in cash in accordance with the procedure hereby established, and to have a lien as above provided for the payment of such share.

Dated February 2nd, 1932.

JNO. C. KNOX,
U. S. D. J.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

Nos. 726 and 727.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY,
as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*,
Constituting a Committee of Creditors
of Morris White, Inc.,
Respondents (Appellees Below).

RESPONDENTS' BRIEF IN SUPPORT OF MOTION TO DISMISS PETITIONS FOR CERTIORARI.

Statement.

Irving Trust Company, one of the respondents above named, was appointed receiver of the assets of the defendant Morris White, Inc., respondent above named, by order of the United States District Court for the Southern District of New York.

Said receivership was made permanent by further order of said District Court, without objection thereto.

The receiver was thereafter directed by order of said District Court to assign and transfer the assets of Morris White, Inc. to The Morris White Handbags Corp. pursuant to an offer for the purchase of said assets. The receiver, pursuant to that order, assigned and transferred said assets to The Morris White Handbags Corp. The offer approved by said order provides that creditors of Morris White, Inc. shall be paid 100% of their allowed claims, as follows: 20% in the notes and 80% in the preferred stock of The Morris White Handbags Corp.

Petitioners, who were the only creditors of Morris White, Inc. that objected to the acceptance of the offer approved by the District Court, appealed to the Circuit Court of Appeals for the Second Circuit from the aforesaid order making the receivership permanent and from the aforesaid order directing the receiver to transfer the assets of Morris White, Inc. to The Morris White Handbags Corp. The said Circuit Court of Appeals rendered its decision on said appeals (54 F. (2d) 255). It ruled that petitioners were entitled to receive payment in cash of their respective aliquot shares of the assets transferred pursuant to the order of the District Court, or, at their option, of the value of the stock and notes offered to creditors of Morris White, Inc. by the offer approved by the District Court; and directed that a Special Master be appointed to ascertain the amount to be paid to petitioners in cash in lieu of the stock and notes offered to creditors in the offer approved by the District Court. The proceedings directed to be taken were for the benefit of petitioners alone. Orders were entered in said Circuit Court of Appeals upon said appeals remanding the cause to the District Court for further proceedings in accordance with the opinion of said Circuit Court of Appeals.

Upon the mandates of the Circuit Court of Appeals, on said appeals, an order was entered in the District Court,

after due notice of settlement, appointing a Special Master to take testimony and other evidence in conformity with the said opinion of the Circuit Court of Appeals. Said order provides that the expense of said hearings and the fees of the Special Master shall be paid by The Morris White Handbags Corp. and shall constitute a lien and charge upon its property. Said order further provides that the receiver shall pay costs on petitioners' appeal and in the District Court. The said costs which are in excess of $1300 have been paid by the receiver and have been received and accepted by petitioners.

Petitioners proceeded to offer proof upon the hearings before the Special Master named in the order of the District Court, as aforesaid, without objection; and they asserted the rights which were awarded to them under the orders of the Circuit Court of Appeals and the order entered in the District Court thereon. No application was made by petitioners for a stay of the proceedings directed by the Circuit Court of Appeals to be taken for petitioners' benefit and no objection was asserted by petitioners to participation in such proceedings. Substantial charges were incurred for stenographic and other services and the Special Master, by virtue of his attendance on such hearings, became entitled to the payment of substantial fees. Such charges and fees constitute a lien on the property of The Morris White Handbags Corp.

Thereafter, on February 23, 1932, petitioners filed in this court two petitions (Nos. 726 and 727, October Term, 1931) for writs of certiorari to review the orders of the Circuit Court of Appeals, pursuant to which proceedings had been taken before the Special Master. The Morris White Handbags Corp. was neither named nor joined as a party in said petitions.

Argument.

1. *The omission of The Morris White Handbags Corp. as a party to petitioners' proceedings in this Court constitutes a fatal defect in petitioners' proceedings and requires the dismissal of both petitions.*

2. *Petitioners have waived all right to review the orders of the Circuit Court of Appeals by participating without objection in the proceedings taken pursuant to said orders and by accepting the benefits thereof.*

POINT I.

The Morris White Handbags Corp., the purchaser of the assets of Morris White Inc. under and pursuant to the orders sought to be reviewed, is a necessary party to all proceedings for review of said orders; and proceedings taken for review of said orders without joining The Morris White Handbags Corp. as a party thereto are fatally defective.

The Morris White Handbags Corp. acquired title to the assets of Morris White, Inc. by virtue of the order appointing a receiver of Morris White, Inc. and the order directing the receiver to transfer those assets to The Morris White Handbags Corp. As purchaser of said assets it is an interested and necessary party in any proceedings for review of the orders pursuant to which it acquired such assets, and is entitled to be heard thereon.

Davis v. *The Mercantile Trust Co.*, 152 U. S. 590 at 595;

Knceland v. *American Loan & Trust Co.*, 136 U. S. 89 at 95;

Baltimore Trust & Guarantee Co. v. *Hofstetter,* 85 Fed. 75 (C. C. A);
Taylor v. *Logan Trust Co.,* 289 Fed. 51 (C. C. A.).

In *Davis* v. *The Mercantile Trust Co., supra,* this Court stated, at page 594:

> "Who is more vitally interested in the question whether such sale and confirmation shall stand than these purchasers?"

Petitioners' proceedings, which challenge the validity of the sale, are fatally defective by reason of petitioners' failure to join the purchaser as a party thereto, and such proceedings must be dismissed. On this the law is settled.

Davis v. *The Mercantile Trust Co.,* 152 U. S. 590, at 595;
Grand Island & W. C. R. Co. v. *Sweeny,* 103 Fed. 342 (C. C. A.);
Taylor v. *Logan Trust Co.* 289 Fed. 51 (C. C. A.).

POINT II.

Petitioners have waived all right to review the orders of the Circuit Court of Appeals by participating without objection in the proceedings taken pursuant to said orders, for the sole benefit of petitioners, and by accepting the benefits thereof.

In common parlance, petitioners may not eat their cake and have it, too. They may not participate without objection in the proceedings conducted for their sole benefit, pursuant to the orders of the Circuit Court of Appeals and assert the rights awarded to them thereunder and thereafter repudiate their conduct by seeking a review of the orders pursuant to which such proceedings were taken. They may not by equivocal conduct burden other interested parties

with the substantial cost and expense of hearings before a Special Master and thereafter question the orders of the Court upon which such hearings were based. Such conduct is repugnant to orderly legal procedure.

Petitioners by their conduct have waived all right to question the orders herein sought to be reviewed by their petitions for certiorari.

> *Albright* v. *Oyster*, 60 Fed. 644 (C. C. A.);
> *Chase* v. *Driver*, 92 Fed. 780, at 786 (C. C. A.);
> *Carson Lumber Co.* v. *St. Louis & S. F. R. Co.*, 209 Fed. 191, at 193;
> *In Re Minot Auto Co.*, 298 Fed. 853, at 857 (C. C. A.).

In *Chase* v. *Driver*, *supra*, the Circuit Court of Appeals for the Eighth Circuit stated in its opinion:

> "* * * When the decree was entered, he had the option to refrain from filing his bond, and to appeal to this court for its reversal or modification, or to file his bond and accept the terms of the decree. He chose the latter alternative. He took the benefit of the sale offered him under the decree which he had sought, and it is too late for him now to escape from the terms prescribed or the burdens imposed thereby. *One who accepts the benefits of a decree or judgment is thereby estopped from reviewing it, or from escaping from its burdens.* * * *"

That the proceedings before the Special Master were not concluded affords petitioners no excuse. Petitioners may not proceed without objection before the Special Master until they have determined that his award will prove unsatisfactory to them and thereafter refuse to continue with such proceedings. They may not saddle another party with the expense of proceedings conducted for their benefit and thereafter seek to repudiate the orders pursuant to which said proceedings were had. By their consent to, and participation without objection in, the hearings before the Special Master, to the substantial prejudice of other parties, petitioners are

estopped from questioning the orders on which such hearings were founded.

It is no excuse that the proceedings before the Special Master were taken pursuant to the order of the Court.

Singer Mfg. Co. v. *Wright,* 141 U. S. 696;
American Book Co. v. *Kansas,* 193 U. S. 49.

In the latter case this Court, in dismissing a writ of error, stated (p. 52):

> "* * * It makes no difference that plaintiff in error 'felt coerced' into compliance. A judgment usually has a coercive effect, and necessarily presents to the party against whom it is rendered the consideration whether it is better to comply or continue the litigation. * * *"

The Judicial Code (R. S. Sec. 1008; U. S. C. A. Title 28, Sec. 350) and the rules of this Court (Rule 38, ¶ 6) make provision for the stay of proceedings ordered below pending the determination of applications for writs of certiorari. Petitioners never made any application for such stay of proceedings and never asserted any objection to participating in such proceedings.

By their conduct petitioners have waived all right to question the orders now sought by them to be reviewed.

CONCLUSION.

For the foregoing reasons both petitions for the issuance of writs of certiorari herein should be dismissed.

Respectfully submitted,

JOSEPH GLASS,
JEROME WEINSTEIN,
CHARLES B. MCINNIS,
NATHAN D. STERN,
MILTON C. WEISMAN,
Counsel for Respondents.

Dated May 3, 1932.

FILE COPY

DEC 12 1932

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 8.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners (Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent (Appellee Below),

MORRIS WHITE, INC.,
Respondent (Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent (Appellee Below),

MICHAEL HOLLANDER, *et al.*, constituting a Committee of Creditors of Morris, White, Inc.,
Respondent (Appellee Below).

BRIEF FOR RESPONDENTS ON WRIT OF CERTIORARI TO REVIEW ORDER OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED NOVEMBER 25, 1931.

JOSEPH GLASS,
JOHN S. SHEPPARD,
JEROME WEINSTEIN,
MILTON C. WEISMAN,
NORMAN M. BEHR,
Counsel for Respondents.

THE BALLOU PRESS NEW YORK

INDEX.

PAGE

THE WRIT HEREIN AND THE QUESTIONS RAISED THEREBY 1

STATEMENT OF FACTS 5

The Nature and History of Defendant's Business.. 5
The Appointment of a Receiver 6
The Creditors' Committee 7
The Liabilities of Defendant 8
The Nature and Value of Defendant's Assets..... 9
The Plan of Reorganization 11
The Attitude of the Creditor Body 14
The Opposition 19

THE DECISION OF THE DISTRICT COURT 20

THE DECISION OF THE CIRCUIT COURT OF APPEALS..... 22

ARGUMENT 25

FIRST POINT. The decree of the District Court dated June 15, 1931, approving the plan of reorganization, was a proper exercise of the power and discretion of that Court. Modification of that decree by the Circuit Court of Appeals awarded to the petitioners something more than that to which they were properly entitled and they may not complain that greater special privileges were not granted to them 25

1. Respondents are properly entitled to assert the validity of the decree of the District Court for the purpose of sustaining the decree of the Circuit Court of Appeals 25

2. The District Court had power to direct the sale of defendant's assets upon terms that provided

PAGE

for satisfaction of the claims of unsecured creditors by notes and preferred stock. The power of the Federal Courts in equity receiverships to compel creditors to accept something other than cash in satisfaction of their claims is firmly established.... 26

3. That power exists in a receivership of an industrial corporation as well as in a receivership of a public utility corporation. The exercise of that power is a matter within the discretion of the Court. 31

4. The plan approved by the District Court gave fair recognition to the rights of creditors and stockholders of the defendants, according to the respective ranks and equities of their claims and, therefore, complies with the "fixed principle" enunciated in the Boyd case (228 U. S. 482)..... 38

(A) The "fixed principle" of the Boyd case merely requires that the reorganization plan shall give recognition to creditors and stockholders substantially in accordance with the respective ranks and equities of their claims..... 38

(B) The plan of reorganization approved by the District Court in the present case makes fair provision for creditors. It fairly recognizes the superiority of their rights over the rights of stockholders of the defendant corporation and provides for the payment of their claims in full.... 39

(C) The plan does not violate the "fixed principle" of the Boyd case in permitting stockholders of the defendant to retain a reversionary interest in the new corporation represented by the common stock 40

(D) The grant of the limited right to the holders of common stock to elect a majority of the

PAGE

board of directors does not violate the "fixed principle" of the Boyd case..... 41

(E) The reorganization plan, in so far as it permitted secured creditors to prove and collect dividends on the full amount of their claims, merely recognized an established rule of equity with respect to the rights of secured creditors..... 42

5. The approval of the plan of reorganization was a proper exercise of the discretion vested in the District Court 43

SECOND POINT. Assuming, however, that the District Court lacked the power to compel dissenting creditors to accept something other than cash in satisfaction of their claims, or that it improperly exercised its discretion in approving the plan of reorganization, the rights of petitioners received full and proper recognition in the decree of the Circuit Court of Appeals..... 46

1. Petitioners were entitled to no more than their pro rata share of the distributable value of the defendant's assets and this was awarded to them by the Circuit Court of Appeals..... 46

2. The Court had power to dispense with an actual public sale of defendant's assets and to substitute therefore the appraisal by a Special Master. 49

3. Appraisal by a Special Master in lieu of public sale was a proper method of determining the value of petitioners' interests..... 53

4. The situation presented to the Circuit Court of Appeals required that Court, in the proper exercise of its discretion, to direct the appraisal instead of a public sale..... 56

CONCLUSION 59

Authorities Cited.

PAGE

Atchison, T. & S. F. R. Co. v. United States (1932), 284 U. S. 248, 260 34

Commercial Credit Co. v. United States (1928), 276 U. S. 226, 230 3

Farmers & M. Bank v. Federal Reserve Bank (1923), 262 U. S. 649 31

First Nat. Bank of Cleveland v. Shedd (1887), 121 U. S. 74, 87 52

Graselli Chemical Co. v. Aetna Explosives Co. (1918, C. C. A. 2d), 252 Fed. 456, 459, 460..... 51

Habirshaw Elec. Cable Co. v. Habirshaw Elec. Cable Co. Inc. (1924, C. C. A. 2d), 296 Fed. 875, 879..... 44

Harding v. American Sumatra Tobacco Co. (1926, D. C. N. D. Ga), 14 F. (2d) 168, 170..... 32

Investment Registry v. Chicago & M. E. R. Co. (1913, C. C. A. 7th), 212 Fed. 594, 609, 610..... 54

Jackson Co. v. Gardiner Inv. Co. (1914, C. C. A. 1st), 217 Fed. 350 55

Jameson v. Guaranty Trust Co. of New York (1927, C. C. A. 7th), 20 F. (2d) 808, 815..... 43

Kansas City Terminal R. Co. v. Central Union Trust Co., (1926), 271 U. S. 445, 452, 454.....27, 28, 34, 40

Kansas City Terminal Ry. Co. v. Central Union Trust Co. (1928, C. C. A. 8th), 28 F. (2d) 177, 184, 186 28, 44, 45

Langnes v. Green (1931), 282 U. S. 531, 538..... 25

Manhattan Rubber Mfg. Co. v. Lucey Mfg. Co. (1925, C. C. A. 2d), 5 F. (2d) 39, 40, 41, 43..... 51

Merrill v. National Bank of Jacksonville (1899), 173 U. S. 131, 146, 147.....42, 43

National Surety Co. v. Architectural Decorating Co. (1912), 226 U. S. 276..... 50

In Re Northampton Portland Cement Co. (1911, D. C. E. D. Pa.), 185 Fed. 542..... 32

PAGE

Northern P. R. Co. v. Boyd (1913), 228 U. S. 482, 504, 507, 508 ..... 27, 34, 38, 40
Penniman's Case (1881), 103 U. S. 714 50
Pennsylvania Steel Co. v. New York City Ry. Co. (1918, C. C. A. 2d), 198 Fed. 721, 738 47
Phipps v. Chicago, R. I. P. Ry. Co. (1922, C. C. A. 8th), 284 Fed. 945, 947, 948, 949 ..... 26, 29, 30, 39, 46, 47, 49
Pittsburgh Steel Co. v. Baltimore Equitable Soc. (1913), 226 U. S. 455 50
In Re Prudential Outfitting Co. (1918, D. C. S. D. N. Y.), 250 Fed. 504, 507 ..... 32, 54
P. R. Walsh Tie & Timber Co. v. Missouri Pac. Ry. Co. (1922, C. C. A. 8th), 280 Fed 38, 43, 44 ..... 30, 43
St. Louis-San Francisco Ry. Co. v. McElvain (1918, D. C. E. D. Mo.), 253 Fed. 123, 126 ..... 29, 49
St. Louis & S. F. R. Co. v. Spiller (1927), 274 U. S. 304, 313 29
In Re Sale of Assets of First Nat. Bank of Florence (1925, D. C. E. D. S. C.), 6 F. (2d) 905 32
Southern Pacific Co. v. Bogert (1919), 250 U. S. 483, 496 55
Steele v. Drummond (1927), 275 U. S. 199, 203 3
Story Parchment Co. v. Patterson Parchment Paper Co. (1931), 282 U. S. 555, 560 25
Union Pacific R. Co. v. Chicago, R. I. & P. R. Co. (1896), 163 U. S. 564, 600, 601 50
Webster Electric Co. v. Splitdorf Electrical Co. (1924), 264 U. S. 463, 464 3
Wilson v. Standefer (1902), 184 U. S. 399 50

Statutes, Etc.

Constitution of the United States, Art. I, Sec. 10, cl. 1 ... 31
National Bankruptcy Act, Sec. 12 36
Report of Solicitor General, Dated December 8, 1931 (appendix to Special Message of the President to Congress, dated February 29, 1932), 39, 90, 92 ..... 35, 36, 53

Legal Periodicals.

PAGE

Coriell v. Morris White, Inc.: A Recent Development in the Law of Corporate Reorganizations (1932), 45 Harvard L. Rev. 697, 699 58

Lattin, Remedies of Dissenting Stockholders under Appraisal Statutes (1931), 45 Harvard L. Rev. 233 53

Weiner, Payment of Dissenting Stockholders (1927), 27 Columbia L. Rev. 547 53

Weiner, Conflicting Functions of the Upset Price in a Corporate Reorganization (1927), 27 Columbia L. Rev. 132, 138 54

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1932.

No. 8.

NATIONAL SURETY COMPANY, *et al.*,
Petitioners,
(Appellants Below),

vs.

VALERIA E. CORIELL,
Respondent,
(Appellee Below),

MORRIS WHITE, INC.,
Respondent,
(Appellee Below),

IRVING TRUST COMPANY, as Receiver of Morris White, Inc.,
Respondent,
(Appellee Below),

MICHAEL HOLLANDER, *et al.*, Constituting a Committee of Creditors of Morris White, Inc.,
Respondent,
(Appellee Below).

BRIEF FOR RESPONDENTS

The Writ Herein and the Questions Raised Thereby.

This case comes before the Court upon a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, issued on May 16, 1932 (286 U. S. 537).

That writ was granted on a petition for certiorari filed herein on February 23, 1932 (October Term, 1931—No. 727) (R. 175). In said petition (p. 2) petitioners sought review of the decree of the United States Circuit Court of Appeals for the Second Circuit, entered on November 25, 1931, modifying a decree made by Judge KNOX of the United States District Court for the Southern District of New York, dated June 15, 1931. That decree of the District Court authorized Irving Trust Company, as receiver, to accept the offer, made pursuant to a plan of reorganization, for the purchase of the assets of the defendant. That offer provides, in substance, that the creditors of Morris White, Inc. be paid 100% of their allowed claims in the following manner: 20% in the notes and 80% in the preferred stock of the reorganized corporation R. 165, 166). Upon the petitioners' appeal to the Circuit Court of Appeals, that Court held that petitioners had a right to be paid in cash their proportionate share of the price which would have been realized on a public sale of the assets after deduction of administration expenses (R. 173).

The Circuit Court directed, in substance, that a Special Master ascertain the value of the defendant's assets as if sold for cash at a public sale on June 15, 1931, and that, out of the sum so ascertained, petitioners be awarded their ratable shares, to be paid to them in cash (R. 173, 174). It further directed that, at petitioners' option, "the preferred stock and notes offered to them may be valued as of the date the reorganization became effective, and that sum paid in cash to them or either of them" (R. 174).

The petition for certiorari granted herein (October Term, 1931—No. 727) recites (pp. 6, 7):

"THE QUESTIONS PRESENTED.

1. Did the Circuit Court of Appeals rightly decide that the petitioners' right was merely to an aliquot share in cash of such sum as a Special Master may find would have been realized if the property of Morris White, Inc. had been sold at public sale on June 15, 1931?

2. Or should the Circuit Court of Appeals have reversed entirely the decree of the District Court dated June 15, 1931, and have directed that the property of the defendant be sold?

3. Did the Circuit Court of Appeals rightly decide that the rights of these petitioners could be fully protected by relegating them, months after the actual transfer had occurred, to a mere guess of a Special Master as to what might have been realized at a public sale six or more months previously, which sale was never held and the terms and methods of which were never determined?

4. If the Circuit Court of Appeals was otherwise right, did it rightly limit the security of the petitioners for the payment of their aliquot share in cash to what might be collected by a sale of the property of Morris White, Inc. transferred to the new corporation, notwithstanding that in the interval much of that property would inevitably be consumed in the new corporation's business before such a sale could be made?"

This Court has repeatedly ruled that it will limit its review on certiorari to the questions raised in the petition upon which the writ was granted.

Steele v. *Drummond* (1927), 275 U. S. 199, 203;
Commercial Credit Co. v. *United States* (1928), 276 U. S. 226, 230;
Webster Electric Co. v. *Splitdorf Electrical Co.* (1924), 264 U. S. 463, 464.

* * * * * * * *

A considerable part of petitioners' brief (pp. 39, *et seq.*) is devoted to an attack upon the administration of this estate

in an equity receivership rather than in bankruptcy proceedings. Petitioners argue that such administration deprived them of their rights under the Bankruptcy Act. Those arguments have already twice been considered and twice overruled by this Court in the instant case.

Simultaneously with the filing of the petition granted herein, these petitioners filed a separate petition for a further writ of certiorari herein (October Term, 1931—No. 726). In said petition, petitioners sought review of the order of the United States Circuit Court of Appeals for the Second Circuit entered on November 25, 1931, which affirmed an order of the United States District Court for the Southern District of New York, dated June 3, 1931, appointing Irving Trust Company as permanent receiver in equity of the defendant, Morris White, Inc. In said petition (pp. 2, 3, 7) petitioners attacked the appointment of a permanent receiver in equity upon the ground that the estate of the defendant, Morris White, Inc., should have been administered in bankruptcy and that administration in equity deprived petitioners of their rights and remedies under the provisions of the Bankruptcy Act. *That petition was denied* by this Court on May 16, 1932 (286 U. S. 553). Thereafter, petitioners applied for rehearing on said petition. *Rehearing was denied* by order of this Court entered October 10, 1932. We believe that this Court, in denying that petition, has given full and careful consideration to petitioners' arguments with respect to the propriety of administration of the estate in equity rather than in bankruptcy.

This brief will, therefore, be confined to the questions raised in the petition which has been granted.

We deem it necessary, however, to refer briefly to petitioners' attack upon the appointment of complainant's solicitors as counsel for the receiver. The fact that the bill of complaint herein had been filed by the receiver's counsel is openly disclosed by the record (R. 7). It was fully known to the District Court. The selection by that Court of a firm of counsel, known to it to be counsel for the complainant, as counsel also for the receiver, was a matter within the discre-

tion of that Court. Such appointment was the act of the Court and violated no rule or order of the Court. It denoted the confidence of Judge KNOX in such counsel. After an open disclosure of the fact that such firm represented complainant, the Court deemed it to be in the best interests of the estate that they be selected as counsel for the receiver and entered an order so appointing them. That order has never been attacked and is no part of the present record. No assignment of error on the appeal to the Circuit Court was predicated on such appointment (R. 160-163). No such objection was made before the District Court. *No such objection appears anywhere in the record.* It has no proper place before this Court.

If petitioners deem such appointment improper, they may still assert their objections in proper and orderly fashion at the time that receiver's counsel make application for allowance. No allowance has as yet been made and all allowances still remain "subject to the approval" of the District Court (R. 152), although petitioners' brief may create a different impression.

While, therefore, receiver's counsel are sensitive to the implications suggested in petitioners' attack upon their appointment, and are prepared to argue that matter *in extenso* before any proper forum, they do not feel that any further statement need be made before this Court, in view of the clear irrelevance of the matter here.

The inferences of fact appearing in petitioners' brief are somewhat misleading. We deem it essential to furnish our own statement of the facts relevant to the questions presented on the writ granted herein.

Statement of Facts.

The Nature and History of Defendant's Business.

The defendant corporation, a New York corporation, was engaged in the manufacture and sale of ladies' handbags and fancy leather goods (R. 1, 68). In this industry, it was the

largest concern in the world (R. 68). It employed between three and four thousand people (R. 68).

Until the recent depression, it had a consistent record of profits (R. 90). In 1925 it did a business of $5,807,000 and its profits were $400,000 (R. 90). In 1926, it did a business of more than $7,000,000 and its profits were in excess of $700,000 (R. 90). In 1927, it did a business of $7,600,000 and its profits were $556,000 (R. 90). In 1928, it did a business of $8,546,000 and its profits were $716,000 (R. 90). In 1929, it did a business of $6,890,000 and its profits were $600,000 (R. 90).

When the present depression began, defendant had on hand orders for $2,000,000 from stores like Marshall Field & Co., Carson, Pirie & Scott, and similar concerns (R. 74). Of such orders $1,500,000 were cancelled (R. 74). In the nature of defendant's business it was required to carry large inventories of raw materials—leather, silks, frames, ornaments, etc. (R. 62). The trend of prices for the past three years is a matter of which this Court has taken judicial notice.

Less than a year prior to the appointment of the receiver, the defendant owed more than $3,000,000 to its creditors (R. 74). That indebtedness had been reduced to $1,072,000 at the date of appointment of the temporary receiver (R. 135).

During the five months preceding the appointment of the temporary receiver, the defendant had been operating its business under the control of creditors (R. 74). Two creditors refused to cooperate with the other creditors (R. 2). Pfister & Vogel Leather Company, on or about April 1, 1931, obtained a judgment against the defendant in the sum of approximately $25,000 (R. 2, 35) and caused execution to be levied (R. 2, 35).

The Appointment of a Receiver.

Following such levy, the complainant, Valeria E. Coriell, a creditor for $27,900, (R. 4) filed a general creditors' bill for the appointment of a receiver to administer defendant's

assets (R. 1-7). The complainant was the assignee of The New Jersey National Bank & Trust Company, a resident of the State of New Jersey (R. 4). The indebtedness alleged was a balance due upon a promissory note (R. 4). The defendant answered and consented to the appointment of a receiver (R. 7, 8).

On April 6, 1931 Irving Trust Company was appointed temporary receiver (R. 8-15). Thereafter, the receiver gave due notice to all creditors of a hearing on the matter of making the receivership permanent (R. 142). After such hearing, and on June 3, 1931, an order was entered making the receivership permanent (R. 141).

The Creditors' Committee.

On call of the receiver, a meeting of creditors was held on April 14, 1931 (R. 17, 56, 72). Creditors with claims in the total amount of $747,000, as ascertained by a poll of those present, attended that meeting (R. 17, 72). The receiver made a preliminary report on the general status of the defendant's business (R. 17, 56). A statement of the assets and liabilities of the defendant as of April 6, 1931, prepared by Kline, Hinds and Finke, certified public accountants, *selected by the creditors,* was read (R. 56, 75, 134-5). The receiver expressed its views as to the value of the assets listed therein (*id.*).

A Creditors' Committee was formed at that meeting (R. 17, 56). That Committee was elected by the unanimous vote of all creditors present (R. 17, 72). It consisted of nine members (R. 17, 32). That Committee included Mr. Hollander, representing a bank creditor (R. 56), Mr. Jephson, representing the Textile Banking Corporation, commercial factors, a merchandise creditor for $40,000 (R. 56), Mr. Weisman, representing the bank creditors; Mr. Rosenberg, representing the Rex Novelty Works, a merchandise creditor for $32,000 (R. 17, 56, 62); Mr. Quigan, a merchandise creditor for $14,000 (R. 56); Mr. Schoenfeld, representing Ar-

tistic Wire Forming Corporation, a merchandise creditor for $30,500 (R. 56); Mr. Hausman, a merchandise creditor for $20,000 (R. 56); and Mr. Bernheim, a merchandise creditor for the sum of $42,000 (R. 62). The Committee directly represented merchandise creditors with claims of approximately $178,000, and the five bank creditors to whom there was owing $262,500 upon unsecured claims and $179,000 upon secured claims (R. 72). The total amount of claims directly represented by the Committee was approximately $600,000.

At the suggestion of that Committee, Mr. Moakes, the representative of the National Surety Company—the leading petitioner—became a member of the Committee *ex-officio* (R. 72, 73). Mr. Moakes participated in all the deliberations of that Committee (R. 72, 73, 124) and himself stated at the hearing before Judge KNOX: "It is true I attended every meeting" (R. 124). Mr. Moakes further stated that he had submitted to the National Surety Company the Committee's various reports (R. 124). The following also appears in the record (R. 124):

> "Mr. Stern: Mr. Moakes, isn't it a fact that you had the full accountant's report of Kline, Hinds & Finke, a photostatic copy of the full report, comprising many many pages?
> Mr. Moakes: That is right."

To the leading petitioner at least, the Creditors' Committee fully disclosed its activities.

The Liabilities of Defendant.

The statement of assets and liabilities of the defendant Morris White, Inc. as of April 6, 1931, prepared by Kline, Hinds & Finke, certified public accountants selected by the creditors, reflects liabilities in the sum of $1,072,000.30 (R. 134-5). $441,616.81 was due to banks (*id.*) and $397,045.12 was due to merchandise creditors (*id.*). Mer-

chandise creditors numbered approximately two hundred forty-five (R. 91). There were five bank creditors (R. 69).

Other substantial items of liability listed in the accountants' statement were $80,624.36 due to the Government of the United States for taxes, $57,697.69 due to the State of New York for taxes, and $16,388.04 for the accrued payroll of defendant's employees (R. 134-5). The Government of the United States had filed its claim with the receiver for $100,000 (R. 50). The State of New York had filed a claim for $57,000 (*id.*). These amounts included taxes, interest and penalties (*id.*). These claims were preferred claims. They were entitled to priority.

Regardless of whether the estate were liquidated in bankruptcy or in equity, the expense of administration would have been substantial. Thus it appears that, on the date of the appointment of the receiver herein, there were preferred charges against the estate for approximately $200,000, to be satisfied prior to distribution to general creditors.

The Nature and Value of Defendant's Assets.

The same accountants' statement (R. 125) lists total assets of $4,116,251.04 (R. 134-5) The statement shows current assets of $1,552,740.34 (*id.*). The largest current asset is represented by merchandise inventories listed at $1,241,208.09 (*id.*). Other current assets listed include in approximate amounts, $5,000 in cash, $300,000 in accounts receivable and $4,000 in listed securities. Approximately $250,000 of the accounts receivable had been pledged as collateral to banks for loans *concurrently* made (R. 134, 72).

The Creditors' Committee elected at the meeting of creditors held on April 14, 1931, appointed a sub-committee to determine the realizable value of the assets (R. 61). That sub-committee met and appraised the estate (R. 61). On that sub-committee were Mr. Hausman, in the cotton and rayon business, Mr. Quigan, in the leather business, Mr. Bernheim, in the leather business, Mr. Rosenberg, in the ornament busi-

ness, and Mr. Schoenfeld, in the wire frame business (R. 61-2).

These men were the creditors who had sold the substantial part of the inventory to the defendant (R. 62). They were all unsecured creditors (R. 62). Their claims averaged in excess of $25,000 each (R. 61, 62).

The Committee reported that the merchandise inventory, listed in the accountants' statement at $1,249,000, was worth $717,000 on a going concern basis and $357,000 on a forced sale in liquidation (R. 62). Finished merchandise listed in the accountants' statement at $508,000 (R. 134) was estimated to have a value of $325,000 on a going concern basis and a value of $207,000 upon forced sale (R. 62). The unfinished merchandise showed far greater shrinkage. Leathers listed in the accountants' statement at $316,000 were appraised by leather merchants on the committee to have a value of $255,000 on a going concern basis, and a value of $75,000 upon a forced sale (R. 62). Frames for handbags listed in the accountants' statement at $161,000 were valued at $80,000 on a going concern basis and at $25,000 upon forced sale in liquidation (R. 62). The Committee's figures indicated that a going concern would realize over $350,000 more upon the current inventory than could be realized on a forced sale in liquidation. Among the other assets of the defendant were machinery and equipment. The machinery and equipment of the defendant were valued at $200,000 on a going concern basis (R. 118). That machinery and equipment, it was estimated, would realize $10,000 if sold at auction (R. 118, 119).

One of the other assets listed in the accountants' statement was a note of the Morris White Holding Company to the defendant Morris White, Inc., in the sum of $1,700,000. This represented moneys loaned (R. 78). The Holding Company owned a number of valuable parcels of real estate in the City of New York, including the Fifth Avenue Hotel, the Hotel White and the Whitehall Hotel (R. 78). In April, 1930, the Morris White Holding Company had raised two

and a quarter million dollars upon its properties by a loan from S. W. Straus & Co. (R. 122). These moneys were turned over to the defendant Morris White, Inc. and used to pay creditors of Morris White, Inc. (R. 122). The Holding Company was threatened with the foreclosure of a blanket second mortgage and unsecured creditors of that company had filed a petition in bankruptcy against it. There was no likelihood of any immediate realization on that asset (R. 78).

On a forced sale, there would have been sacrificed an inventory worth $717,000 on the basis of a going concern, machinery and equipment worth $200,000 to a going concern, and the largest item of all—the good will inherent in a business which was the largest in its industry and which theretofore had consistently done an average annual business in excess of $5,000,000 and had consistently earned annual profits averaging in excess of $500,000 a year.

The Plan of Reorganization.

After appraising the assets, the Creditors' Committee drafted a plan of reorganization (R. 73, 74). That plan is embodied in the offer of Lily White, dated April 29, 1931 (R. 17). The plan was unanimously approved by the Creditors' Committee (R. 17). It was then submitted for approval to the District Court and to all creditors (R. 15-34).

The terms of the offer, as submitted to the Court, were modified pursuant to the directions of Judge KNOX made upon the hearing (R. 152, 153). The offer as finally approved by the Court (R. 18-32, 151-155) provides for the transfer of all of the defendant's assets, less the amount required to satisfy the obligations of the receiver and the fees and expenses of administration, to a corporation to be organized. This corporation is referred to as the New Corporation (R. 20). The fees and allowances of the receiver and the receiver's counsel and all other allowances for services rendered in the proceeding or incident to the said offer and its acceptance, payable out of the assets of the estate, are expressly made subject to the approval of the Court (R. 152).

Creditors are to receive payment of 100% of their allowed claims in the following manner: 20% in notes of the New Corporation, in four notes of 5% each, payable at intervals of six months commencing January 1, 1932; and 80% in the preferred stock of the New Corporation (R. 26, 27). In the event of default in payment of any of the said notes, all of such notes shall, at the option of each holder thereof, become due and payable (R. 27).

The preferred stock is to be issued only and solely to creditors of defendant, pursuant to the plan (R. 21). The holders of preferred stock are entitled to cumulative dividends at the rate of 6% per annum commencing January 1, 1934 (R. 152). The preferred stock is to be placed in the name of two voting trustees for a period of ten years, one of such trustees to be designated by the members of the Creditors' Committee representing merchandise creditors and the other trustee to be designated by the members of the Creditors' Committee representing the bank creditors (R. 28, 29). Voting Trust certificates are to be issued to individual creditors (R. 29).

The New Corporation is authorized to issue one thousand shares of common stock without par value for such consideration as the Board of Directors might deem proper (R. 21). No dividends are to be paid on common stock of the New Corporation until all the outstanding shares of the preferred stock shall have been retired (R. 23).

One-third of the operating profits of the New Corporation for any fiscal year ending after July 1, 1933, must be applied to the retirement of the preferred stock (R. 24). The manner of computing such profits is fixed, and such profits are to be determined by an audit to be made each year by a firm of certified public accountants (R. 24). On dissolution, the par value of the preferred stock and accrued dividends are to be paid in full before any distribution is made to the holders of the common stock (R. 24).

The holders of the preferred stock are entitled to vote solely and as a class upon the creation of priorities or further

preferences among the several classes of stock (R. 22). They are entitled also as a class to vote for the election of two out of the five Directors of the New Corporation until the preferred stock shall have been fully retired (R. 22). Until the notes are fully paid, "the Board of Directors shall have the sole and exclusive right to employ executives of said corporation and to fix the amount of salary as to all of said executives of said New Corporation, and such action of said Board of Directors shall be concurred in by four of the five members of the said Board of Directors" (R. 23).

In order to assure to the creditors the benefit of the services of Morris White, the offer provides that in the event that Morris White shall fail to qualify as president of the New Corporation, or fail to continue as executive in general charge, the holders of the preferred stock "shall have the sole and absolute right as a class to elect three of the New Corporation's directors" (R. 22).

The acceptance of the offer is conditioned upon the filing of a stipulation with the Court by Morris White whereunder he shall agree that he will, for a period of three years, render his sole and exclusive services to the New Corporation, and that he will not at any time during the said period in any way carry on or be connected with any other business or undertaking, except that he shall be free to devote his time and attention to realty enterprises in which he may then have an interest (R. 152, 153).

It is a further condition of the said offer that the New Corporation shall, before the transfer of the assets of the defendant, obtain the release of the receiver from all claims of the Government of the United States and the State of New York against the receiver (R. 153). The New Corporation is required to file a notice of appearance submitting itself to the summary jurisdiction of the Court (R. 29).

On petition of the receiver, an order was signed on May 12, 1931, directing all creditors and any and all other persons interested to show cause at a hearing to be held on the 26th day of May, 1931, why the offer "should not be ac-

cepted and approved by this Court *and at such time and place to consider and act upon any other offer or offers which may then be made*" (R. 15, 16).

The order directed the receiver to mail a copy thereof to all creditors of the defendant and to all parties interested, known to the receiver, on or before May 16, 1931 (R. 16). The offer is part of that order (R. 18). The order further directs the receiver to publish in the New York Times on or before May 15, 1931, a notice briefly stating the provisions of the order (R. 16). Petitioners have stipulated on the record "that the receiver gave due notice of hearing pursuant to the terms of the foregoing order" (R. 16).

Following publication of the notice, several prospective purchasers examined the assets (R. 127), but no other bidder appeared (R. 151). The only offer submitted for the defendant's assets was the offer set forth in the order to show cause. The District Court found as a fact that "no offer other than said offer of Lily White dated April 29, 1931 for the purchase of the assets of the defendant and of the receiver's right, title and interest therein has been made" (R. 151).

The hearing before the District Court began on May 26, 1931 and was continued on the following day (R. 48, 59).

The receiver advised the Court that it was a neutral party to the plan and neither favored nor opposed its adoption (R. 49). The District Court then heard from the creditor body.

The Attitude of the Creditor Body.

Creditors with claims aggregating approximately $850,000 out of the total listed liabilities of $1,072,000 affirmatively voiced their approval of the plan. The creditors' committee had unanimously adopted a resolution recommending approval of that plan (R. 33). That committee directly represented merchandise creditors with claims aggregating $178,000 and bank creditors with claims aggregating $441,500 (*vide supra*, p. 7).

The Government of the United States had filed a claim for $100,000 for taxes, interest and penalties. It expressed its attitude through a special representative, Mr. Cash, sent from Washington, who stated (R. 105):

> "Now, the Commissioner was impressed with the information that this meant the employment of a number of people. Of course, the Commissioner of Internal Revenue is not in the Department of Labor, but using the old term that you don't want to kill the goose that lays the golden egg, the Commissioner wanted to preserve the status of this taxpayer, if he could, so that he could pay future taxes. He has been a very liberal taxpayer; we made investigation there and found that over a period of years, or in recent years these taxes have been paid very liberally by this taxpayer, and we want to preserve it; and like my friend from Boston, I believe the Commissioner expressed the opinion that this man is a genius in this particular work and we feel that the only way to preserve the rights of the creditors and incidentally and also to preserve the rights of the Government, is to permit this new organization and to relieve this man so that he can work out his problems, the problem of paying the Government as well as the ordinary creditors."

And the Government, although entitled to priority, agreed that the tax might be assessed against the New Corporation as transferee and to "take instalments that will not be burdensome" (R. 105).

The State of New York, with a claim for $57,000 due for franchise taxes was willing to enter into a similar arrangement (R. 101).

Vincent Astor, an unsecured creditor in the sum of $47,000, stated through his counsel, Mr. Lyeth, of Carter, Ledyard and Milburn (R. 66-7):

> "May it please the Court, I represent Vincent Astor, the landlord of the premises on which this business has been conducted. Mr. Astor is not a member of the Creditors' Committee, and his claim is not listed among those with the Creditors' Committee. His claim is $47,000

> odd. We have known Mr. Morris White for a great many years, and I say to the Court that we have confidence in his ability to come back. He built up a business from practically, as I understand it, nothing, to a position which in this handbag business is probably second to none in this country, and he had made a great deal of money. * * * My client feels that the only hope of the creditors obtaining any substantial return is to give Mr. Morris White the chance to come back. * * * my client is in favor of the plan; and we have arrived at that conclusion after long discussion with Mr. Morris White individually, and I personally have talked to Mr. Wolinsky, his manager, and I am convinced it is to the best interests of the creditors to accept this offer."

Merchandise creditors not represented on the Creditors' Committee expressed the same view. J. Greenbaum Tanning Co., a merchandise creditor in the sum of approximately $6,000, sent its representative, Mr. Vise, from Chicago. He stated (R. 60):

> "This particular business, as I understand it, is more than a business of buying and selling of merchandise; it involves creative talent, and I believe that Morris White has a great deal of creative talent which can be utilized; and Mr. Tuttle in his argument yesterday objected to the management—the continued management of the business by the same parties. Now, I believe that there should be an amendment to the particular order and decree, providing that Morris White should consent to an injunction, if you please, so that the creditors will have the benefit of his services for a limited time."

The V. S. & M. W. Snyder Co., Inc. (by its representative, Mr. Berman, sent from Boston), a merchandise creditor in the sum of $20,000, which had no representative on the Creditors' Committee, stated (R. 103-4):

> "I represent not only the amount of money; this involves the shut-down of the entire industry and we have got to get started, and if Mr. White does not get started soon, we don't get started and—
>
> The Court: What do you supply?

Mr. Berman: Metal,* sir. As far as our experience has been in matters like this, where, in bankruptcy cases or some similar cases, we never got anything out of it any other way; I don't remember any occasion. We get this talk about the assets; we very seldom get more than 5 per cent at the most, or 10 per cent. And here I know Mr. White, and I don't mind telling you, your Honor, that there is not a second White; never was, and there never will be; not only from my standpoint, but from the standpoint of the entire industry. I have been connected with it, if your Honor please, for at least twenty-seven years, and I remember what it was then what it is now.

The Court: How much did you sell him in the course of a year?

Mr. Berman: Well, we have had the good fortune of selling Mr. White as much as half a million dollars a year; we practically depend upon him; the entire industry lacks confidence to go ahead. * * * And I want your Honor please to remember that it is not just the creditors alone that are involved in it, it is the very future. I don't mind telling you, if, God forbid, anything happened to Mr. White, I would be out of that business—I don't know what I would be doing next—and I am not only myself, but three hundred families in our works—we are shut down; we made up that stock, but what good is it? * * *

And I myself, your Honor, am fearful of the estate, that if it is not handled by a man that understands it, that it is not worth a darn. They can only be utilized by a man that really knows what he is about, and there is no man in New York City who would deny this fact: That Mr. White is Mr. White; that he is not an accident; he didn't get that money by not knowing well; he got that money because—I am proud of the fact, your Honor, to express my opinion for the first time in front of this man, that I was one of them that knows him and understood him—what he said was right; he created that business, just where it was, because it is him; and I am fearful, if your Honor please, for any other way or procedure but to allow him to go ahead; and I can go back home

* The Record (R. 103, 104) indicates that this creditor supplied leather, not metal.

> and put the other boys to work, and we have got just about 5,000 dozen that is finished up to the pickle, ready to go ahead."

Another creditor with a claim of $38,000 and not directly represented on the Creditors' Committee, stated (R. 130):

> "Your Honor, I am one of the creditors for $38,000, and I honestly believe—I never attended any meeting, but I know the concern, and I know just the way this thing is coming around, that unless the creditors work with Mr. Morris White, the creditors would not get a nickel; and I speak as a creditor—I am not protected, I am not insured—let Morris White reorganize his business and get back again and make good so that we will realize some money on it at some future date."

The creditors *affirmatively* recommending the adoption of the reorganization plan, included the United States Commissioner of Internal Revenue, the State of New York and other creditors representing, approximately, 85% of defendant's liabilities. Petitioners' brief (p. 16) refers to the majority of the creditor body which approved of the plan of reorganization as a "well organized claque". This imputation is supported only by the assertion of petitioners' counsel. It was accepted neither by the District Court nor by the Circuit Court of Appeals. It is not supported by the record. It does appear on the record that the plan of reorganization was approved by 98% of defendant's 250 creditors. They desired to preserve the demonstrated value of defendant's good will, as to which the Circuit Court of Appeals said (R. 166):

> *"It was established in the court below that Morris White, Inc., consistently made profits averaging about $500,000 per year, which demonstrated a good will not valued."*

On the basis of that good will, the reorganized corporation within two years would have been able to discharge in full its $1,000,000 of liabilities.

The Opposition.

The Court specifically invited an expression of opinion from creditors opposing the plan (R. 92):

> "I want to ask if there is any one here who is opposed to this plan other than those who have already spoken."

All 5 petitioners had theretofore expressed their opposition to the plan. There were no other dissenters. Out of approximately 250 of the defendant's creditors, the petitioners were the only opponents.

The petitioner, Herman Loewenstein, is a merchandise creditor with a claim of $5600 (R. 60). The petitioner, G. Levor & Co., Inc., is a judgment creditor with a claim of $4500 (R. 65).

The petitioners, National Surety Company, American Credit Indemnity Co., and London Guarantee and Accident Company, Ltd., are not direct creditors of the defendant. Unlike the other creditors they had done no business with the defendant. Their claims arise out of credit insurance policies issued upon various merchandise accounts with the defendant (R. 135-7).

Claims aggregating $92,138.15 had been filed against the surety companies (R. 167). Included among those claims was the above mentioned claim of G. Levor & Co., Inc. (R. 136) upon which the National Surety Company denied liability (R. 65, 66). The policies of credit insurance purported to cover only part of the accounts insured (R. 129). Counsel for the surety companies, although the Court requested them to do so, were unable to state either the approximate or the maximum amount of the contingent liabilities upon policies which had been issued (R. 129). On the hearing, counsel for the Surety Companies stated: "The only claim paid is that $19,000 claim" (R. 129).

Counsel for dissenting creditors referred at the hearing to "persistent rumors of side agreements" between the defendant and creditors (R. 106) and asked for leave to submit

affidavits with respect thereto (R. 117). The affidavits thereafter submitted by petitioners contained no reference to any such "side agreements" (R. 135-141). And when counsel for dissenting creditors were given an opportunity to examine Mr. White as to any such agreements, one of them said (R. 107):

> "I have no information as to any side agreements. It would be a fishing expedition, as far as I am concerned."

Prior to the hearing, petitioners' counsel made no attempt to obtain any information from the receiver or the receiver's counsel or the Creditors' Committee (R. 63-4, 71, 123, 125). Requests for information made at the hearing by petitioners' counsel were complied with; an inventory was available and every question that was asked was answered (R. 107, 126, 127, 128). The court examined Morris White under oath (R. 118) and then submitted him for examination to the creditor body (R. 121). Counsel representing one of the petitioners did examine Mr. White (R. 121).

The Decision of the District Court.

At the close of the hearing in the District Court, Judge KNOX rendered his decision in favor of the acceptance of the offer (R. 130-132), subject to certain modifications. Those modifications were, in substance, as follows (R. 152-3):

> (1) That dividends on the preferred stock be cumulative commencing January 1, 1934.
>
> (2) That all allowances and fees for services rendered in the proceedings, payable out of the estate, "shall be subject to the approval of this Court."
>
> (3) That Morris White stipulate and consent, under injunction, to render his exclusive services to the New Corporation for a period of three years.
>
> (4) That the New Corporation stipulate in proper form to assume payment of the amounts due for State and Federal taxes.

In his opinion, Judge KNOX stated (R. 130-131):

> "That if the estimate of value which has been placed upon the assets of the defendant corporation is anywhere near correct, it means, if this concern goes into liquidation, that the general creditors will get little or nothing as a result, due to the fact that machinery, such as I imagine is contained in that place, would bring only junk prices, and that the silks and leather that might be devoted to the manufacture of ladies hand bags, would be little more than remnants and that it would be bought at a highly depreciated value by whomsoever might wish to enter this business; and that the priority claims, such as the Federal Government's taxes, and the State Government taxes, would take practically all that might be realized from such a sale. The experience that I have had in seeing businesses such as this liquidated has been of a character as to lead me to believe that not much is to be hoped for from that standpoint; and that in addition to the small sum of money that would probably be derived from such a sale, there would have to be deducted the expenses of administration; the auction sale of the assets would be an expensive matter, in the way of lotting, I should think; and that if liquidation takes place I should be surprised if creditors would realize more than between 5 or 10 percent, at the utmost."

Judge KNOX, in his decree of June 15, 1931, approving the offer, made the following findings of fact (R. 151-2):

> "3. No offer other than said offer of Lily White dated April 29th, 1931 for the purchase of the assets of the defendant and of the Receiver's right, title and interest therein has been made.
>
> 4. The value of the assets of the defendant upon the basis of liquidation by the Receiver is substantially less than the value of such assets on a going concern basis.
>
> 5. The general creditors of defendant will realize only a small recovery upon their indebtedness if liquidation by the Receiver is had.
>
> 6. Continuance of the business under the plan embraced in the said offer of Lily White would enable the

preservation of the difference between the liquidation value of the assets of defendant and the value of said assets on a going concern basis and would enable the preservation of the value of the good will of defendant.

7. Continuance of the business under the plan embraced in the said offer of Lily White would afford the general creditors a better opportunity to recover the indebtedness owing them than they would have if such assets were now to be liquidated.

8. Said offer is fair and equitable to all of the creditors of defendant and its acceptance upon the terms herein stated is in the best interests of such creditors."

The Decision of the Circuit Court of Appeals.

Petitioners appealed to the Circuit Court of Appeals for the Second Circuit from the District Court's order (R. 157, 159).

The gist of petitioners' objections in the Circuit Court of Appeals is stated in the opinion of that Court as follows (R. 168):

> "The question presented to us is whether these minority creditors are obliged to accept the plan, taking stock and notes in place of cash, and be contented to wait the outcome of this new venture in the hope that some day the preferred stock will be redeemed and payment of their notes made. Have the appellants been deprived of their rights as creditors by this order?"

The Circuit Court of Appeals held that the order of the District Court, in so far as it deprived objecting creditors of the payment in cash for their *pro rata* interest in the defendant's assets, was improper and reversed the order to that extent. It held (R. 173):

> "An outstanding circumstance is the willingness of the majority of creditors to proceed with this reorganization, expressing the view, as they did in the court below, that the rehabilitation of White's business gave the best promise for the payment of their debts. * * * But the minority creditors, appellants, insisting upon the right

to share immediately in the proceeds of a forced sale of the corporation's assets, have dissented. Their rights must be protected. They are ordinarily entitled to a public sale with competitive bidding, the assets to be sold to the highest bidder. They have a just claim to their proportionate share of the price which would have been realized at such sale after deduction of administration expenses. If a court of equity can protect these rights and at the same time carry out the wish of the other creditors, who favor the plan of reorganization, it should be done. The reorganization plan has been put into operation, and creditors, excepting the appellants, are content to have it proceed. We think both may be protected."

The Circuit Court of Appeals directed that the appellants be paid their distributive share of the assets in cash (R. 173-4):

"The appellants will be fully protected by having an appraisal of the value of their respective claims made before a master, to be appointed, who will take an account of the assets and liabilities of Morris White, Inc., ascertaining the value of the assets as if sold at a public sale. * * * In this way, from the ascertained sum of money that would have been realized, had a sale taken place, the appellants may be awarded their aliquot shares of the assets. This sum must be paid in cash, or, at the option of each of the appellants, the preferred stock and notes offered to them may be valued as of the date the reorganization plan became effective, and that sum paid in cash to them or either of them. * * * If payment is not thus made in cash, the several amounts which appellants are found entitled to may be collected by a sale of the property transferred to the new corporation. * * * There will thus be preserved to appellants their right to payment in cash, and it removes the objection they properly raise. The remaining creditors, satisfied with the plan, are then free to proceed with its operation."

The Circuit Court of Appeals in its opinion further said (R. 173):

> "The appellants should have full opportunity to question any preference that may have been made. The banks should not collect on the security which has been pledged as collateral, and, in addition thereto, receive preferred stock. They may agree to accept preferred stock and notes for such sums as they do not realize upon the sale of the collateral up to the amount of their respective claims, but no more."

The order of the Circuit Court, now under review, provides (R. 175):

> "* * * that the order of said District Court be, and it hereby is, reversed, with costs and cause remanded to the District Court for further proceedings in accordance with the opinion of this Court."

The basic assumption upon which the Circuit Court of Appeals reversed the decree of the District Court is that the District Court lacked power in an equity receivership of a private corporation to compel creditors to accept anything other than cash in satisfaction of their claims. The Circuit Court further assumed that the plan of reorganization approved by the District Court was inequitable in that it permitted secured creditors to prove the full amount of their claims and to receive dividends thereon. In both assumptions the Circuit Court of Appeals erred.

ARGUMENT.

FIRST POINT.

The decree of the District Court dated June 15, 1931, approving the plan of reorganization, was a proper exercise of the power and discretion of that Court. Modification of that decree by the Circuit Court of Appeals awarded to the petitioners something more than that to which they were properly entitled and they may not now complain that greater special privileges were not granted to them.

1. *Respondents are properly entitled to assert the validity of the decree of the District Court for the purpose of sustaining the decree of the Circuit Court of Appeals.*

This is settled by recent decisions of this Court.

> *Langnes* v. *Green* (1931), 282 U. S. 531, 538;
> *Story Parchment Co.* v. *Patterson Parchment Paper Co.* (1931), 282 U. S. 555, 560.

In the latter case, Mr. Justice SUTHERLAND, delivering the opinion of the Court, stated:

> "Respondents seek to sustain this judgment upon that ground and also upon the additional ground, which the lower court found against them, that there was no evidence of a conspiracy or combination to monopolize interstate trade. *Because there was no cross petition for certiorari, petitioner insists that the additional ground is not open here for consideration. But respondents do not invoke that ground in order to overthrow the judgment below, but to sustain it; and this they may do.** Langnes v. Green, 282 U. S. 531 * * *."

---

* Italics here and in all subsequent quotations are ours, unless otherwise indicated.

If the decree of the District Court, dated June 15, 1931, was a proper exercise of the power and discretion of that Court, petitioners cannot complain of the decree of the Circuit Court of Appeals which gives to petitioners greater rights than the decree of the District Court.

2. *The District Court had power to direct the sale of defendant's assets upon terms that provided for satisfaction of the claims of unsecured creditors by notes and preferred stock. The power of the Federal Courts in equity receiverships to compel creditors to accept something other than cash in satisfaction of their claims is firmly established.*

Such power has grown out of the administration of a trust imposed upon the Court. We have found no better specification of the character and extent of that trust than that of Circuit Judge WALTER H. SANBORN in *Phipps* v. *Chicago, R. I. & P. Ry. Co.* (1922, C. C. A. 8th), 284 Fed. 945.

He said that, upon the appointment of the receiver (p. 949):

> "* * * that court [the District Court] held all that property [of the defendant] in trust, subject to the liens of the secured creditors, to operate it and to distribute it or its proceeds to all the unsecured creditors and all the stockholders of the insolvent company according to the respective ranks and equities of their claims. Every unsecured creditor then and thereafter was a cestui que trust of the court, entitled to a like interest in the property in proportion to the amount of his claim, as every other such creditor and every stockholder was a cestui que trust of the court, entitled to a like interest in the property in proportion to the amount of his stock to that of every other stockholder. When that court had so operated the property, and by its decree had so distributed either the property itself or its proceeds, it had faithfully executed its trust and rendered the right decree."*

---

* Matter in brackets here and in all subsequent quotations ours, unless otherwise noted.

The question presented is whether, in executing and carrying out the trust imposed upon the Court in the case at bar, Judge KNOX had power to require a small group of dissenting creditors to accept in satisfaction of their claims securities in the reorganized company.

The *power* of the Federal Courts in equity receiverships to compel creditors to accept something other than cash in satisfaction of their claims is established by decisions of this Court. In *Northern P. R. Co.* v. *Boyd* (1913), 228 U. S. 482, attack was made upon the sale of assets pursuant to a plan of reorganization. The sale and reorganization had been held invalid by the Courts below because stockholders were inequitably preferred to creditors. The late Francis Lynde Stetson, counsel for the Railway Company, the appellant in this Court, argued that the approval of Boyd's contention would require payment in cash to all dissenting creditors and that this would make reorganizations impossible. The Court rejected this argument, declaring in its opinion, at page 508:

> "*This conclusion does not, as claimed, require the impossible, and make it necessary to pay an unsecured creditor in cash* as a condition of stockholders retaining an interest in the reorganized company. *His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock.* If he declines a fair offer, he is left to protect himself as any other creditor of a judgment debtor, and, having refused to come into a just reorganization, could not thereafter be heard in a court of equity to attack it."

Petitioners' brief (p. 32) refers to the foregoing language of this Court in *Northern P. R. Co.* v. *Boyd, supra,* as a *dictum.*

That the language used by this Court in the *Boyd* case embodies the deliberate and considered opinion of the Court is conclusively settled by its subsequent decision in the case of *Kansas City Terminal R. Co.* v. *Central Union Trust Co.* (1926), 271 U. S. 445. The District Court, on a creditors' bill, had appointed a receiver in equity. The assets of

the defendant were purchased by a creditors' committee pursuant to a plan of reorganization. The reorganization plan offered to unsecured creditors the alternative of (a) one-third share of preferred stock, $100 par value, and two-thirds share of common stock, without par value, for each $100 of their allowed claims, or (b) $20 in bonds and one share of common stock, upon payment of $18 (271 U. S. at p. 452). The District Court overruled objections of dissenting creditors. The matter went to the Circuit Court of Appeals for the Eighth Circuit. The Circuit Court certified questions to this Court for instructions.

This Court, answering the questions certified, stated (271 U. S. at p. 454):

> "This doctrine is the 'fixed principle' according to which Northern P. R. Co. v. Boyd (p. 507 (57 L. Ed. 943, 33 Sup. Ct. Rep. 554)), declares the character of reorganization agreements must be determined; and to it there should be rigid adherence. But as that opinion states, this does not require the impossible and make it necessary always to pay unsecured creditors in cash before stockholders may retain any interest whatever in the reorganized company. By way of illustration it further pointed out, that such creditors can be protected 'by the issuance, on equitable terms, of income bonds or preferred stock.' And we now add that, when necessary, they may be protected through other arrangements which distinctly recognize their equitable right to be preferred to stockholders against the full value of all property belonging to the debtor corporation, and afford each of them fair opportunity, measured by the existing circumstances to avail himself of this right."

Upon the answers made to the questions certified, the Circuit Court of Appeals for the Eighth Circuit sustained the validity of the plan. *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.* (1928), 28 F. (2d) 177.

In accordance with the doctrine enunciated in the *Boyd* case, and reaffirmed in the *Kansas City Terminal Ry.* case, there have been numerous decrees of sale in equity re-

ceiverships upon terms which compelled creditors to accept notes, preferred stock or common stock of the reorganized company in satisfaction of their claims.

In *St. Louis-San Francisco Ry. Co.* v. *McElvain* (1918, D. C. E. D. Mo.), 253 Fed. 123, the Court sustained the validity of a sale of assets pursuant to a plan of reorganization. The reorganization plan provided that unsecured creditors receive $50 par value 6% non-cumulative preferred stock and $50 par value common stock for each $100 of duly allowed claims. The order confirming the sale was made over the objections of dissenting creditors (253 Fed. at p. 126).

The validity of the plan of reorganization in the *St. Louis-San Francisco Ry.* case, *supra,* was upheld by this Court in the case of *St. Louis & S. F. R. Co.* v. *Spiller* (1927), 274 U. S. 304. In that case, Spiller, a creditor of the St. Louis-San Francisco *Railroad* Company obtained a judgment after the sale under the reorganization plan. Spiller attacked the validity of the sale, seeking to charge the property of the defendant acquired by the new company with the amount of his judgment. This Court held that the plan was a fair plan and that Spiller was bound thereby (274 U. S. pp. 313 *et seq.*).

In *Phipps* v. *Chicago, R. I. & P. Ry. Co.* (1922, C. C. A. 8th), 284 Fed. 945, the Court sustained the validity of a decree in an equity receivership which required all unsecured creditors to accept 6% preferred stock to the amount of their claims, together with interest at the rate of 5% in cash, and barred them from asserting any further claim against the defendant corporation (284 Fed. at p. 947). Phipps had sued the Railway Company for damages for personal injuries, and obtained a judgment for $7,000 in the State Court of Missouri. After the termination of the receivership, he caused an execution to be issued upon his judgment against the assets of the Railway Company and sought to attach and garnishee amounts owing to that Company. Immediately upon the issuance of the attachment by Phipps, the Railway Company applied to the United

States District Court in Missouri, at the foot of its ancillary decree, for an injunction against the enforcement by Phipps of his judgment against the Railway Company.

The case squarely raised the question of the Court's power to compel dissenting creditors to accept securities in satisfaction of their claims. Judge WALTER H. SANBORN, writing the Court's opinion, said, at page 949:

> "Every unsecured creditor then and thereafter was a *cestui que trust* of the Court, entitled to a like interest in the property in proportion to the amount of his claim, as every other such creditor and every stockholder was a *cestui que trust* of the Court, entitled to a like interest in the property in proportion to the amount of his stock to that of every other stockholder * * * *Nor was it indispensable to such a just result, or to a lawful decree that the interest or share of any of the cestuis que trust should be secured or paid to him or it in cash. It was within the power and the judicial discretion of the court to adjudge and secure that interest or share to him or it in the stock, bonds, or other securities of the reorganized company.*"

In *P. R. Walsh Tie & Timber Co. v. Missouri Pac. Ry. Co.*, (1922, C. C. A. 8th), 280 Fed. 38, the Court upheld a plan of reorganization which provided (see p. 43) that general creditors of the defendant should receive convertible 5% preferred stock equal to the amount of their respective claims.

The foregoing cases establish the *power* of the Court in an equity receivership to compel creditors to accept something other than cash in satisfaction of their claims. Admittedly these cases relate to receiverships of railroads and other semi-public corporations. The defendant in the cause at bar was not in that category. There is, at least, a suggestion in the opinion of the Circuit Court (R. 171) that this difference limits the power of the Court and dictates a different rule with respect to private corporations. The fact that a corporation is a public utility may permit a broader regulation of that corporation's activities. That is not the question in this case. We are here concerned with the power

of the Court in an equity receivership to compel creditors to accept something other than cash.

3. *That power exists in a receivership of an industrial corporation as well as in a receivership of a public utility corporation. The exercise of that power is a matter within the discretion of the Court.*

If there is any basis for the contention that the dissenting creditor has an absolute right to cash, *it must rest in the creditor's right—not in the character of the corporation* in which he has an interest. If a creditor has the right to cash, we can conceive no reason why he should not have it as much against a railroad, gas or electric light company as against the United States Steel Corporation or the General Electric Company. The rights of creditors of private corporations are no more sacred than are the rights of creditors of public utilities. If a different rule does exist with respect to private corporations, that difference must relate not to jurisdiction but to the exercise of jurisdiction, not to power but to policy.

There is no constitutional prohibition against the exercise of the same powers in an equity receivership of an industrial corporation as are exercised in an equity receivership of a public utility. There is nothing in Article I, Section 10, Clause 1, of the Constitution of the United States, cited in the opinion of the Circuit Court of Appeals (R. 169), which requires that, in an equity receivership of a private corporation, creditors must be paid in cash. That provision of the Constitution, in so far as relevant, is to the effect that:

> "No State shall * * * make any Thing but gold and silver Coin a Tender in Payment of Debts; * * *."

This is a provision against legislation by the several States; and the case of *Farmers & M. Bank* v. *Federal Reserve Bank* (1923), 262 U. S. 649, cited by Judge MANTON (R. 169), relates to such legislation. That provision of the Constitution does not purport to restrict the powers of a

Court of equity, nor does it make any distinction between public and private corporations. The "due process" clause does not touch the matter, in the existing state of the decisions. This Court has specifically held that a dissenting creditor has no inherent right to be paid in cash upon reorganization. The question of what is "due process" in the equity Court has thereby been settled for creditors of industrial corporations as well as for creditors of railroads.

There is no direct or decisive authority which denies the jurisdiction of a Court of equity in receiverships of private corporations to compel creditors to accept a fair equivalent of their claims in something other than cash. We do not question the correctness of the decision of Judge LEARNED HAND (then District Judge) in *Re Prudential Outfitting Co.*, (1918, D. C., S. D., N. Y.) 250 Fed. 504, or the opinion of Judge MCPHERSON in *Re Northampton Portland Cement Co.* (1911, D. C., E. D., Pa.), 185 Fed. 542, which are quoted in petitioners' brief (pp. 29, 30) and are cited in the opinion of the Circuit Court of Appeals (R. 171). These cases relate to a sale of assets in bankruptcy and the restrictions of the Bankruptcy Act are applicable thereto. Nor are we here concerned with cases dealing with special statutory provisions governing liquidation of an insolvent national bank, such as that of *Re Sale of Assets of First Nat. Bank of Florence* (1925, D. C., E. D., S. C.), 6 F. (2d) 905, a case cited both in petitioners' brief (p. 30) and in the opinion of the Circuit Court of Appeals (R. 171).

There is language in *Harding* v. *American Sumatra Tobacco Co.* (1926, D. C., N. D., Ga.), 14 F. (2d) 168, which expresses a doubt about the existence of this power in the receivership of an industrial corporation, but that language is pure *dictum*. The decision rests upon the ground (p. 170) that the Court lacked jurisdiction over the subject matter.

The element of a "public interest" involved in the "utility" receiverships has no bearing on the question of the rights of creditors. But, assuming that it has, the factual basis for the distinction between utilities and industrial corporations

is lacking in our present regime of "big business". The element of public interest which is involved in the continued operation and reorganization of a railroad or other semi-public corporation, may also exist in the case of industrial corporations. The disruption of large industrial corporations affects the public as vitally as the so-called "utilities". The public now has the same large investments in these huge industrial companies that it has in the "utilities". It has the same vital need for what it gets from the industrial corporation as for that which the "utility" companies furnish it. If the United States Steel Corporation or the General Electric Company should cease to function the public would suffer as much as if a street car company suspended its operations.

The business of the defendant in the case at bar involved no such great public interest as that of the United States Steel Corporation. Nevertheless, the defendant was the leader in its particular field of industry. Prior to this receivership, it had done an average business in excess of $5,000,000 a year. It employed between three and four thousand people. When the defendant's business ceased to function, that entire industry came to a standstill. As one creditor stated:

> "* * * this involves the shutdown of the entire industry and we have got to get started, and if Mr. White does not get started soon, we don't get started. * * *" (R. 103).

Certainly, the public interest demands that industry and business shall be continued in operation, wherever possible. Industrial enterprises, large and small, are today in dire financial difficulty. To destroy such enterprises by forced liquidation for cash, because a single creditor demands it, is to disregard the rights of the majority of the creditor-body who favor reorganization, and to ignore the present demands of public interest.

The wisdom of the establishment of this power of a Court of equity on reorganization to compel dissenting creditors to

accept something other than cash, is emphasized and exemplified by the financial and commercial troubles that now beset us. This Court, very recently, has taken judicial notice of the depression and commented on its vital importance in dealing with present problems. The Court said in *Atchison, T. & S. F. R. Co.* v. *United States* (1932), 284 U. S. 248, speaking by the Chief Justice (p. 260):

> "There can be no question as to the change in conditions upon which the new hearing was asked. *Of that change we may take judicial notice. It is the outstanding contemporary fact, dominating thought and action throughout the country.*"

The Court thus knows, quite as well as any of the rest of the world, that markets for things to be sold have disappeared as a practical matter. Everyone with any practical knowledge of existent conditions knows that an owner of real estate today cannot find a buyer for it at any price worth calling a price, and that countless creditors of such real estate owners are faced with exactly the same problems and the same limitations that the creditors of Morris White, Inc., had to face on this receivership. The condition of the real estate market is only typical of what exists in every other field of business or commercial activity. The Court knows, too, that, as a concomitant of this inability to sell things, the obtaining of cash in any appreciable amount is an undertaking beyond the power of most of us. And, it is hardly necessary to add, Judge KNOX was quite as cognizant of these difficulties as this Court has announced itself to be.

Such considerations, which the economic conditions drive home to us so irresistibly, demonstrate forcefully the wisdom of this Court in announcing, as it has in the *Boyd-Northern Pac.* and *Kansas City Terminal* cases, that the discretion of the District Court in executing the trust imposed on it in these equity receivership cases, is not to be limited by any unyielding and drastic requirement that cash must be paid to dissenting creditors upon reorganization. In the existing

circumstances, it is practically impossible to get cash. The expedients available in ordinary times and conditions for raising cash to pay dissenting creditors are not now available. Though the majority of the creditors and stockholders may desire reorganization they cannot contribute cash for that purpose. A cash limitation on the exercise of the discretion of the Court in these matters would be tantamount to a decree that no reorganizations can be put through during the continuance of the depression.

The present Bankruptcy Act does not afford the requisite machinery to meet this need. It is the defects of this Act which have given rise and impetus to the potent movement now under way to amend the Bankruptcy Act by adding specific provisions permitting such reorganizations in bankruptcy proceedings. The Court will, doubtless, recollect the recommendations of the Solicitor General to this effect, based upon somewhat similar provisions in the English Act.

The Solicitor General's report on this matter, bearing date of December 8, 1931, appears as an appendix to the President's special message to Congress under date of February 29, 1932. In Part IV of that Report, entitled "Remedies", the Solicitor General speaking of the defects of the present Bankruptcy Act says (p. 39):

> "Instead of affording relief to debtors before their affairs have been completely ruined in financial failure, *the Act insists upon liquidation or a cumbersome process of composition* and no practical method is provided for saving debtors from ruin without branding them as bankrupts.
>
> "We have concluded, therefore, that *the Act should be amended so as to provide remedial process* in voluntary proceedings under which debtors, unable to pay their debts in due course, may have the protection of the Courts, without being adjudged bankrupt, *for the purpose of composing or extending the maturity of their debts, amortizing the payment of their debts out of future earnings*, procuring the liquidation of their property under voluntary assignments to a trustee, *and in the case of corporations for the purpose of a reorganization.*"

The details concerning these suggestions are discussed at length in the appendix to the Solicitor General's Report.

On page 90, *et seq.*, "Corporate Reorganizations" are discussed. The Solicitor General says (p. 90):

> *"The process of liquidation in bankruptcy is in most cases essentially destructive of these interests* [those of the public in the corporation], *because it can not preserve the value of a going concern."*

A new Section of the Bankruptcy Act is recommended for the reorganization of corporations. The Solicitor General characterizes this proposed amendment as follows (p. 90):

> "Proceeding upon the principle applied in compositions, that *the views of a substantial majority of the creditors should control* the measures to be adopted for the protection and preservation of their rights in the failing business, subject at all times to a finding by the Courts that what they propose is fair and equitable to the minority, the proposed amendments not only afford a simple, prompt, and effective process of reorganization, but they are carefully drawn to adequately preserve the rights of lien holders and other creditors, who appear and insist upon such relief, *to have their interests fairly appraised and liquidated by cash payments."*

Our adversaries suggest that a reorganization of the sort we are discussing could be put through in a bankruptcy proceeding under the provisions in the existing Bankruptcy Act for compositions (Sec. 12). And it could be, if the situation afforded the time to follow through what the Solicitor General has accurately defined as the "cumbersome process" (see p. 35, *supra*), for which the present Act provides. In composition proceedings, such persistingly dissentient creditors as the petitioners in the case at bar can delay and postpone the approval and execution of a composition plan for a long time if they set out with that end in view. With the procedure required under that Section—the examinations and objections available to objectants under the com-

position provisions of the present Bankruptcy Act—it may be months before the plan can be carried out. Such delay is all too often fatal.

Under existing conditions, the only proceeding available to the creditors of corporations in distress who desire a reorganization to preserve their interests, and do not want the business to be sold under the hammer at a ruinous sacrifice, is this equity receivership. Its availability in such difficult times as those now existing, is due to the wise determination of this Court, that an unreasonably dissenting creditor can not prevent a reorganization because cash cannot be obtained for him in such a time of chaos.

There is another consideration to be thought of in dealing with this contention for the cash limitation of the equity Court's power in executing the trust imposed upon it in equity receiverships. This consideration comes about from the changed conditions in the commercial world. Individualism in business is an outworn dogma. Every merchant who sells goods to another today, every banker who loans money to the merchant, every workman who sells the merchant his labor—in short, every person of any sort who has dealings with the merchant knows that he is one of tens or hundreds or thousands who are dealing with the merchant just as he himself has done. He knows that the interests of these others are as inextricably intertwined with those of that merchant as his own. He knows, or he ought to know, that he cannot exact his "pound of flesh" from the merchant without undue injury to the others, similarly situated to himself. And the Courts know this quite as well as the members of the mercantile or banking world. They appreciate thoroughly the necessity—for it is that now!—for creditors to work together, especially when it comes to salvaging what they can out of a financial or commercial wreck. They understand, too, the impossibility of allowing a single creditor, or a small group of dissenting creditors, to prevent the vast majority of creditors from adopting and carrying out what they believe to be the best means of salvage. With this

change in the character of commercial and financial dealings, the general policy of the law must be, to limit the power of the vastly predominating majority of the creditors as little as is consistent with the preservation of those ultimate individual rights which are inherent in our system.

The petitioners have characterized the equity Court, exercising the power to approve a reorganization without cash to the dissenter, as a "benevolent despot" and an "absolute autocrat". We believe we have dissipated any idea of that sort in what we have said above. But it may be permissible to call the Court's attention to the character of the position which the dissenting creditor would occupy if the contentions of petitioners should prevail. The dissenting creditor would then truly occupy the role of "absolute autocrat". He would then be in a position to dictate not only to the other creditors but also to the Court. Everyone else—creditors and Court—may believe that the best chance of salvage is to be found in the reorganization venture, without cash. He differs, and, if the petitioners' argument is sound, his view must control. This smacks of "despotism" and "autocracy", and of a kind not suited to the needs and temper of our times!

4. *The plan approved by the District Court gave fair recognition to the rights of creditors and stockholders of the defendants, according to the respective ranks and equities of their claims and, therefore, complies with the "fixed principle" enunciated in the Boyd case* (228 U. S. 482).

(A) *The "fixed principle" of the Boyd case merely requires that the reorganization plan shall give recognition to creditors and stockholders substantially in accordance with the respective ranks and equities of their claims.*

The reorganization considered in the *Boyd* case made no provision whatsoever for unsecured creditors (228 U. S. 482, 504). This Court held (pp. 507, 508) that the plan was unfair, not because it gave to stockholders an interest in the reorganized company but, rather, because it made no offer of

participation to unsecured creditors and failed completely to recognize the superior equity of creditors. As was said by Judge SANBORN in *Phipps* v. *Chicago, R. I. & P. Ry. Co.*, 284 Fed. 945, at 948:

> "The vice which rendered the foreclosure, judicial sale, and delivery of the property to the reorganized corporation voidable by unsecured creditors in the *Boyd Case*, 177 Fed. 804, 101 C. C. A. 18, Id., 228 U. S. 482, 502, 504, 33 Sup. Ct. 554, 57 L. Ed. 931, and in the *Kansas City Southern Railway Co. Case*, 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579, was not the lack of judicial sales of the property under the decrees, but the fact that *under the plans of reorganization and by the decrees in those cases the stockholders of the insolvent corporations were given for their stock beneficial interests in the reorganized companies* by way of stocks, bonds, or other securities, *while the unsecured creditors of the insolvent companies were given nothing.*"

That vice does not inhere in the present plan of reorganization.

(B) *The plan of reorganization approved by the District Court in the present case makes fair provision for creditors. It fairly recognizes the superiority of their rights over the rights of stockholders of the defendant corporation and provides for the payment of their claims in full.*

Under the plan of reorganization, creditors receive, in lieu of their claims as proved and allowed, 20% in the notes and 80% in the preferred stock of the reorganized corporation (R. 26-7). One-third of the annual operating profits of the business must be devoted to the retirement of preferred stock (R. 24). Cumulative dividends, at the rate of 6% per annum, are payable on the preferred stock commencing January 1, 1934 (R. 152). No dividends are to be paid on the common stock until all preferred stock shall have been retired (R. 23). On dissolution, the par value of the preferred stock and accrued dividends are to be paid in full before any dis-

tribution is made to holders of common stock (R. 24). The rights of the stockholders of the old corporation, through ownership of the common stock of the reorganized corporation, are thus subordinated to the prior payment of the notes and preferred stock issued to creditors. All the stockholders of the old corporation receive is a reversion after the creditors are paid in full. The plan recognizes the superior right and rank of the claims of the unsecured creditors, provides for the satisfaction of those claims in full and, therefore, fully complies with the "fixed principle" of the *Boyd* case.

(C) *The plan does not violate the "fixed principle" of the Boyd case in permitting stockholders of the defendant to retain a reversionary interest in the New Corporation, represented by the common stock.*

Petitioners argue that the issuance of common stock of the reorganized company to stockholders of the old company, constitutes a violation of this "fixed principle". Petitioners misconceive the "principle". In the *Boyd* case, this Court said (228 U. S. at p. 508):

> "This conclusion does not, as claimed, require the impossible, and make it necessary to pay an unsecured creditor in cash *as a condition of stockholders retaining an interest in the reorganized company.* His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock."

In *Kansas City Terminal R. Co.* v. *Central Union Trust Co.*, 271 U. S. 445, this Court, after discussing the "fixed principle" announced in the *Boyd* opinion, said, at page 454:

> "But, as that opinion states, this does not require the impossible and *make it necessary always to pay unsecured creditors in cash before stockholders may retain any interest whatever in the reorganized company.*"

In these cases, the Court has held that the superior rights of creditors can be fairly recognized and dealt with by the

issuance to them of bonds or preferred stock. The old stockholders may be permitted to retain the reversionary interests which is what the common stock represents. Therefore, the issuance of common stock to stockholders of the old corporation is not a violation of the "fixed principle".

(D) *The grant of the limited right to the holders of common stock to elect a majority of the board of directors does not violate the "fixed principle" of the Boyd case.*

This Court has held that bonds or preferred stock may be issued to satisfy the creditors' rights. Bonds or preferred stock rarely, if ever, carry with them control of the corporation or even voting rights. That control usually rests with the common stock. Under the "fixed principle" the common stock may be given to the old stockholders if the rights of creditors are otherwise recognized in some equitable manner.

The question as to what control the creditors, as preferred stockholders, should exercise over the affairs of the new corporation was a matter for the business judgment of the creditor body. The preferred stock is entitled to elect two of the five directors until the preferred stock is fully retired (R. 22). The reorganization plan provides that if Morris White failed to continue as executive in general charge of the business of the reorganized corporation, the preferred stockholders are entitled to elect a majority of the board of directors (R. 22). The plan further provides that, until the promissory notes issued to creditors under the plan are fully paid, the board of directors shall have the exclusive right to employ executives of the new corporation and that the vote of four directors shall be required for this purpose (R. 23). Thus the consent of one of the two directors representing the preferred stock is required to give the common stock the right to elect a majority of the board of directors.

It was the desire and will of the great majority that Morris White remain in control of the new corporation (R. 109). It was the opinion of creditors that his ability constituted a most valuable asset of the business (R. 60, 103). The creditors

knew they could not run the business (R. 109). They did not want to run the business (*id.*). They believed that the services of Morris White were essential for that purpose (R. 103-4). Indeed, Judge KNOX, as a condition of the approval of the plan of reorganization, required that Morris White consent to an injunction compelling him to render his services exclusively to the reorganized corporation for a period of three years (R. 152-3). The great majority of the creditor body and the District Court believed that the interests of creditors required the management of the business to remain in the hands of Morris White. It is not for the minority, whose superior rights have been fairly recognized by the issuance of preferred stock and notes, to dictate to the great majority of the creditor body with respect to the control and the business policy of the new corporation.

(E) *The reorganization plan, in so far as it permitted secured creditors to prove and collect dividends on the full amount of their claims, merely recognized an established rule of equity with respect to the rights of secured creditors.*

The Circuit Court of Appeals, in its opinion (R. 173), intimated that the plan of reorganization gave an improper advantage to secured creditors. It held that secured creditors were entitled to receive "preferred stock and notes for such sums as they do not realize upon the sale of the collateral up to the amount of their respective claims, but no more" (R. 173). In this the Circuit Court erred. It is settled beyond question that in equity a secured creditor is entitled to prove for the full amount of his claim and to collect dividends thereon up to the full amount of any deficiency. That rule was recognized by this Court in *Merrill* v. *National Bank of Jacksonville* (1889), 173 U. S. 131. In that case the Chief Justice (FULLER), speaking for the Court, said at page 146:

> "We repeat that it appears to us that the secured creditor is a creditor to the full amount due him when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule.

> And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, though the receiver may redeem or be subrogated as circumstances may require."

and further stated at page 147:

> "Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities, cease, but collections therefrom are not otherwise material."

The principles above stated are now settled law. To have deprived the secured creditors of the right to prove and obtain dividends on the full amount of their claim would have been a violation of the rights of the secured creditors and would have subjected the reorganization plan to proper criticism on their part.

5. *The approval of the plan of reorganization was a proper exercise of the discretion vested in the District Court.*

The fact that the great majority of creditors approved of the plan, does not establish the plan to be a fair and proper one. It is, however, most persuasive evidence of the fairness of that plan.

> *Jameson* v. *Guaranty Trust Co. of New York* (1927, C. C. A. 7th), 20 F. (2d) 808, 815;
> *P. R. Walsh Tie & Timber Co.* v. *Missouri Pac. Ry. Co.* (1922, C. C. A. 8th), 280 Fed. 38, 44.

A determination of the fairness of the reorganization plan must, to a considerable degree, rest in the discretion of the trial Court. A plan of reorganization necessarily represents the compromise of conflicting claims. The exact mathematical adjustment of those claims is not always possible. As was said by Judge MAYER in *Habirshaw Elec. Cable Co.* v. *Habirshaw Elec. Cable Co. Inc.* (1924, C. C. A. 2d), 296 Fed. 875, 879:

> "The court, of course, must decide whether or not the plan is fair and equitable before it orders the sale which is the step precedent to effectuating the plan. It is rare that such a plan is academically perfect. In the maze of rights, compromises become necessary, and failure to agree upon some reasonable plan necessarily leads to unfortunate results, involving loss to those concerned."

The Circuit Court of Appeals for the 8th Circuit, in *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.*, 28 F. (2d) 177, stated in its opinion, at page 186:

> "The reorganization of an *insolvent* business involves considerations (practical and legal) not present in the reorganization of a solvent business. * * * The former are compelled by the inexorable logic of a hard situation; are designed to save as much as may be from impending wreckage and always involve changes in the existing legal rights of some (often all) of those having such rights in connection with the property involved." (Italics by Court.)

That Court had previously stated in its opinion, at page 184:

> "* * * In short, each *such reorganization must be examined and determined in a practical way* with a view of preserving the prior rights of unsecured creditors as far as may be having in mind the *necessities of the situation of the particular property.*"

That Court further said, in its opinion, at page 184:

> "* * * It is firmly established that *when a matter is committed to the sound discretion of a chancellor, his*

determination thereon will not be set aside unless clearly shown to be erroneous. The wisdom of this rule is accentuated where the matter involved is the reorganization of an insolvent property in receivership under the chancellor approving or disapproving the plan of reorganization. *The administration of an insolvent operating property during receivership is so largely a practical business matter that the chancellor gains an experience and insight into the property, its condition, its needs and the relative attitude of interested parties which can never, in its entirety, be transmitted to the printed record. From this intimate association with the property must necessarily come no inconsiderable portion of the 'informed discretion concerning the practical adjustment' of the chancellor."*

Judge KNOX, who approved of the reorganization plan, had appointed the Receiver herein. He was in charge of the administration of this and other receivership estates. He was familiar with the history of the receivership and the manner in which it had functioned. He had gained a familiarity with the nature of the property which affected his discretion in determining the proper method for its administration. In rejecting the plea of petitioners for an immediate liquidation, he said (R. 131):

> "The experience that I have had in seeing businesses such as this liquidated has been of a character as to lead me to believe that not much is to be hoped for from that standpoint; * * *."

Having due regard to "the necessities of the situation of the particular property" and the desires of the great majority of the creditor body, he properly approved this plan of reorganization which gives fair and practical recognition to the rights of *all* creditors. He found (R. 152):

> "8. Said offer is fair and equitable to all of the creditors of defendant and its acceptance upon the terms herein stated is in the best interests of such creditors."

That finding is clearly right.

SECOND POINT.

Assuming, however, that the District Court lacked the power to compel dissenting creditors to accept something other than cash in satisfaction of their claims, or that it improperly exercised its discretion in approving the plan of reorganization, the rights of petitioners received full and proper recognition in the decree of the Circuit Court of Appeals.

The Circuit Court of Appeals sustained petitioners' claim of a substantive right to be paid in cash. It decreed that a Special Master ascertain and award to petitioners their ratable share of the value of defendant's assets on public sale. Thus, it substituted for the ritual of public sale the appraisal of a Special Master. That Court also gave to petitioners the option of claiming the cash value of the notes and preferred stock offered to assenting creditors under the plan of reorganization, to be determined by a like appraisal.

1. *Petitioners were entitled to no more than their pro rata share of the distributable value of the defendant's assets and this was awarded to them by the Circuit Court of Appeals.*

The petitioners were entitled to neither a greater nor a lesser share than any other unsecured creditor. Had the defendant's assets been sold for cash, petitioners' rights would have been fully satisfied by a ratable share in the proceeds available for distribution after the payment of prior claims and proper administration expenses.

As was said in *Phipps* v. *Chicago R. I. & P. Ry. Co.* (284 Fed. 945, 949), upon the appointment of a receiver

> "that court held all that property in trust, subject to liens of the secured creditors, to operate it and to distribute it or its proceeds to all the unsecured creditors

and all the stockholders of the insolvent company according to the respective ranks and equities of their claims. *Every unsecured creditor then and thereafter was a cestui que trust of the court, entitled to a like interest in the property in proportion to the amount of his claim, as every other such creditor* and every stockholder was a cestui que trust of the court, entitled to a like interest in the property in proportion to the amount of his stock to that of every other stockholder. When that court had so operated the property, and by its decree had so distributed either the property itself or its proceeds, it had faithfully executed its trust and rendered the right decree."

Judge NOYES, of the Circuit Court of Appeals for the Second Circuit, dealing with the rules applicable to the administration of assets in an equity receivership, said in *Pennsylvania Steel Co.* v. *New York City Ry. Co.* (1918), 198 Fed. 721, at 738:

"Equitable considerations must govern and the underlying ones are these: The assets of an insolvent corporation belong to its creditors. Although not, strictly speaking, a trust fund, they partake of the nature of one. The administration of the estate is for their benefit. Its purpose is to make an *equitable distribution. Equality is equity.*"

The Circuit Court of Appeals gave petitioners their proper *pro rata* share of the defendant's assets. The decision of the Circuit Court provides (R. 173):

"* * * But the minority creditors, appellants, insisting upon the right to share immediately in the proceeds of a forced sale of the corporation's assets, have dissented. Their rights must be protected. They are ordinarily entitled to a public sale with competitive bidding, the assets to be sold to the highest bidder. They have a just claim to *their proportionate share of the price which would have been realized at such sale after deduction of administration expenses.*"

And, further (R. 174):

> "* * * This sum must be paid in cash, or, *at the option of each of the appellants, the preferred stock and notes offered to them may be valued as of the date the reorganization plan became effective, and that sum paid in cash to them or either of them.*"

The decision of the Circuit Court of Appeals grants to petitioners the option of claiming their *pro rata* interest in defendant's assets, either on the basis of forced liquidation or on the basis of a going concern. Petitioners have no equitable claim to more.

The Circuit Court of Appeals held that petitioners' proportionate share of the price which would have been realized at public sale was subject to "deduction of administration expenses" (R. 173). Petitioners object to the provision for administration expenses and protest against the payment of any part thereof.

It may fairly be assumed that the Circuit Court of Appeals intended the words "administration expenses" to mean proper expenses of administration. The District Court, in its order on the mandate of the Circuit Court of Appeals, has so construed these words. That order provides that the Special Master in ascertaining the amount to be awarded to petitioners shall take an account of "the expenses of the administration of the estate herein incurred up to the 15th day of June, 1931" (*vide*, Pets.' Br., p. 63). It further provides that the petitioners shall be charged with "such portion of the obligations of the receiver and the expenses of administration therein as would have been *properly* chargeable against the estate had the assets of Morris White, Inc. been liquidated by sale, * * *" (*vide*, Pets.' Br., p. 64).

The proper expenses of administration must, in every case, be paid. The decision of the Circuit Court says no more than that. If petitioners wish to object to the future allowance of any administration expenses upon the ground that such particular allowances would be improper, that question can

and should be properly raised at the time that the application for an allowance is made. It is not properly at issue here.

2. *The Court had power to dispense with an actual public sale of defendant's assets and to substitute therefor the appraisal by a Special Master.*

In an equity receivership, a public sale of the assets is part of the usual formula of administration. It is a procedural device for converting the assets into cash so that the proceeds may be distributed among creditors. It is, however, no more than a part of the machinery of administration which has for its purpose to effect the requisite equitable distribution of defendant's assets. It is part of the remedy but not of the right. The procedure which the Court may adopt for the liquidation of defendant's assets is a matter subject to the proper discretion of the Courts.

A public sale of the assets is not essential to the proper administration or distribution of the estate. In *Phipps* v. *Chicago R. I. & P. Ry. Co.*, 284 Fed. 945, Judge SANBORN stated in his opinion, at page 949:

> "* * * The decisions in those cases [the *Boyd* and *Kansas City Southern* cases] demonstrate the fact that judicial sales are futile to extract the vice of a failure by a plan of reorganization and decree to secure to creditors their equitable shares of the beneficial interests in the reorganized corporations, and that fact is in itself a persuasive argument that a *plan of reorganization and decree which does adjudge and secure or offer to the creditors their just and fair shares of the benefits of the reorganized company,* either in its stocks, bonds, or other securities, *is just, fair, and imperrious to the attacks of such creditors, although no judicial sale is adjudged thereby or made thereunder.*"

In his opinion, at page 952, Judge SANBORN, referring to the case of *St. Louis-San Francisco Ry. Co.* v. *McElvain,* 253 Fed. 123, said:

> "It is true that there was a judicial sale in that case, and that in the case in hand there has been no judicial sale; but it was not the judicial sale that made the decree and the title of the reorganized company in that case impervious to the attacks of the creditors of the old company. It was the offer to them in stock of the reorganized company of *their fair and equitable shares in the benefits* of the participation in that company. *A like decree without the sale would have been equally conclusive.*"

That there is no vested right to any particular form of remedy or any particular mode of procedure is firmly settled law.

> *National Surety Co.* v. *Architectural Decorating Co.* (1912), 226 U. S. 276;
> *Pittsburgh Steel Co.* v. *Baltimore Equitable Soc.* (1913), 226 U. S. 455;
> *Wilson* v. *Standefer* (1902), 184 U. S. 399;
> *Penniman's Case* (1881), 103 U. S. 714.

A Court of equity has power to modify its procedure and to mold its remedies in giving effect to substantive rights. This is established beyond question. In *Union Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.* (1896), 163 U. S. 564, this Court stated, at pages 600-601:

> "*It must not be forgotten that in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them.* As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated;' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new

kinds of wrongs are constantly committed.' Pom. Eq. Jur. Sec. 111."

In *Graselli Chemical Co.* v. *Aetna Explosives Co.* (1918, C. C. A. 2d), 252 Fed. 456, 459, the Court said:

> *"A court of equity's modes of relief are not fixed and rigid. It can mold its remedies to meet the conditions with which it has to deal.* The jurisdiction of equity is the whole domain of conscience, limited only by legislative enactment. The faculty of equity must be energetic, productive, and progressive."

The Court further stated (p. 460):

> "* * * In the absence of power created by legislation in this country, the federal judges, sitting in courts of equity, have endeavored to secure to the rights of those interested, including the stockholders at the time of readjustment of large corporations a protection to meet the needs of the occasion. *Changing times, with change in economic needs, require the courts of equity to mold remedies to meet the conditions with which they have to deal."*

The *Aetna Explosives* case, *supra,* is not overruled in *Manhattan Rubber Mfg. Co.* v. *Lucey Mfg. Co.* (1925, C. C. A. 2d), 5 F. (2d) 39, as petitioners' brief (p. 29) implies. It is cited with approval in the prevailing opinion of Judge Manton (pp. 40-41) and in the dissenting opinion of Judge Hough. In such opinion, Judge Hough stated, at page 43:

> "* * * Thus the primitive view of a bill like this one led to regarding it as no more than the reduction to the court's possession of a certain amount of property and to confining the activities of chancery to the preservation, distribution, or restoration of that property to or among the persons entitled to the same.
>
> *But no one was ever able to know beforehand the ramifications of such a matter, or to foresee the demands that would be made upon the discretion, the boldness, or the inventive ability of the court whose aid creditors, shareholders, and directors united in seeking.* * * * *Such conditions, political and commercial, are increasingly*

presenting new and vexatious questions loudly calling for what one of our ablest judges has called 'the plastic remedies of equity.'

Such a situation was acutely presented to this court in *Graselli, etc. Co.* v. *Aetna, etc. Co.*, 252 F. 456, 164 C. C. A. 380. * * * It [the decision in the *Aetna Explosives case*] was made after exhaustive argument by counsel of learning, *and the result was of primary importance if equitable proceedings for reorganizations or in insolvency are to continue and to grow, as all living things must grow.*"

A court of equity will vary its usual methods of relief according to the exigencies of the case. The usual rule in foreclosure proceedings is that the rights of all parties claiming an interest in the property shall be adjudicated in advance of the sale. That this rule of procedure is subject to change in the proper discretion of the Court, was decided in *First National Bank of Cleveland* v. *Shedd* (1887), 121 U. S. 74. In that case, proceedings for the foreclosure of two trust mortgages were pending. A dispute arose as to the extent of the priority of the first mortgage and as to the amount due thereunder. The District Court ordered a sale of the properties in advance of the determination of these questions. In its opinion, the Court, speaking by the Chief Justice (WAITE) said, at page 87:

"* * * *The court below, having the practical workings of the receivership under its own eye,* did not hesitate to say that 'it is now entirely clear that the best interests of all parties concerned will be promoted by a speedy sale,' and we see nothing to the contrary.

Of the power of the court to make such an order in a proper case we have no doubt. *The property is in the possession of the court and is depreciating in value by the accumulation of receiver's indebtedness, while the litigation between the parties as to their respective interests in it is going on.* There cannot be a doubt that the whole ought to be sold together. If in the end it shall be found that the Rawle mortgage covers only a part, it will be as easy to fix the rule for dividing the proceeds equitably

between the two securities after a sale, as before, and there is nothing in the decree as entered to interfere in any way with such a distribution."

3. *Appraisal by a Special Master in lieu of public sale was a proper method of determining the value of petitioners' interests.*

The determination of value by appraisal, in lieu of public sale, is not only practical but common. Indeed, the Solicitor General in his report dated December 8, 1931, to which we have already referred (*supra*, pp. 35, 36), recommended (p. 90) that the Bankruptcy Act be amended to permit reorganizations approved by the majority of the creditor body and suggested that the interests of dissenting creditors be fixed by *appraisal*, and liquidated by cash payment. His suggestion (in subdivision (f), (5) (c) of the proposed new Section 76 of the Bankruptcy Act) is that the claims of dissentients may be satisfied, *inter alia*, "by appraisal and payment in cash of the value of such liens and claims, or, at the objecting creditors' election, of the securities allotted to such liens and claims under the plan". (Appendix to Solicitor General's Report, p. 92). The Court will note that the Circuit Court of Appeals gave petitioners precisely what the Solicitor General suggests as the proper measure of relief to dissenting creditors.

Appraisal is a method which long has been used to fix the cash value of the interest of minority stockholders who oppose a sale of corporate assets or corporate mergers. (Lattin, *Remedies of Dissenting Stockholders under Appraisal Statutes* (1931), 45 Harv. L. Rev. 233; Weiner, *Payment of Dissenting Stockholders* (1927), 27 Col. L. Rev. 547).

Stripped of outward forms and regarded as a matter of substance, Federal Courts have, under the guise of an "upset price", fixed the value of assets sold in an equity receivership and have thereby determined by appraisal the *pro rata* cash payment to be made to dissenting creditors. In theory the upset price represents the minimum bid which the

Court will accept for the assets. In practice it represents the maximum price which will be paid for those assets. (Weiner, *Conflicting Functions of the Upset Price in a Corporate Reorganization* (1927), 27 Col. L. Rev. 132, 138). In receiverships of large corporations, there are rarely any bidders for the assets other than the reorganization committee. (Weiner, *id.*, p. 138). The upset price is intended to protect the interests of the dissenting minority. (*Investment Registry* v. *Chicago & M. E. R. Co.*, (1913, C. C. A. 7th), 212 Fed. 594, 609, 610). The upset price is, thus, a determination by the Court of the cash payment to be awarded to dissenting creditors. In directing that the value of the defendant's assets on public sale be determined by the appraisal of a Special Master instead of by an actual sale, the Circuit Court in this case did no more than what Courts of equity have repeatedly done under the guise of fixing an "upset price." It merely dispensed with what had become an empty form.

Petitioners argue that the decision of the Circuit Court of Appeals is "too indefinite and is impossible of performance". Petitioners' argument assumes that it is not possible for the Special Master to ascertain what assets were transferred or to determine "the value of the assets as if sold at a public sale" on June 15, 1931. In both assumptions, petitioners err.

A determination by the Special Master of the assets transferred pursuant to the decree of the District Court, presents no unique or extraordinary problem. The same problem would have been presented if the Circuit Court of Appeals had reversed the decree of the District Court in its entirety and had required the reorganized corporation to account for the assets which it had received. Such a problem has heretofore arisen on the *vacatur* of a bankruptcy sale, and the judicial machinery of an accounting before a Special Master has been found adequate therefor. *In re Prudential Outfitting Co.* (1918), 250 Fed. 504, 507.

A determination of the value of the assets as if sold at a public sale, on June 15, 1931, a date antecedent to the Special Master's determination, presents a simple question of fact.

Similar questions are regularly presented for judicial determination. Upon an application to vacate a sale in bankruptcy upon the ground of inadequacy of consideration, the court must determine the value of the assets at the date of sale. Under statutory provisions, which exist in practically every state, stockholders who oppose a sale of the assets of the corporation may, subsequent to the date of sale, obtain an appraisal of the value of their interest in the assets of the corporation at the date of the sale, and claim that amount in cash (*Jackson Co.* v. *Gardiner Inv. Co.* (1914, C. C. A. 1st), 217 Fed. 350). In the ordinary action for breach of contract of sale, the Court must often determine the market value of goods as of a date several years prior to such determination. In *Southern Pacific Co.* v. *Bogert* (1919), 250 U. S. 483, 496, this Court remanded the case to the trial court for the purpose of determining far more complicated questions of fact which had arisen in connection with a reorganization over thirty years prior thereto.

A determination of the questions presented to the Special Master under the order of the Circuit Court of Appeals is clearly within the scope of ordinary legal procedure.

Petitioners complain that they are not adequately protected by the decree of the Circuit Court of Appeals. That decree provides "If payment is not thus made in cash, the several amounts which appellants are found entitled to may be collected by a sale of the property transferred to the new corporation" (R. 174). The decree of the District Court entered upon the mandate of the Circuit Court of Appeals awards petitioners a lien on all the assets of Morris White, Inc. in the posssession of the reorganized corporation and enjoins the reorganized corporation from transferring any of said assets "except in good faith in the regular course of its business and for fair and proper consideration " (*Vide* Pets.' Br., p. 67). Petitioners' claims if proved and allowed represent approximately 10% of the defendant's liabilities. The Circuit Court of Appeals awarded to the claims of petitioners a priority over the interests of the assenting creditor body

and the District Court, by its order, has enforced that priority. Indeed, the District Court enjoined the reorganized corporation from making payment to the assenting creditors upon the notes due on January 2, 1932, and directed that the sum of $33,000 deposited by the reorganized corporation for that purpose be held pending the further order of the Court (Pets.' Br., p. 67). The decision of the Circuit Court and the decree entered by the District Court, pursuant to the mandate of the Circuit Court, afforded to petitioners an abundant protection.

4. *The situation presented to the Circuit Court of Appeals required that Court, in the proper exercise of its discretion, to direct the appraisal instead of a public sale.*

The discretion of a court of equity in awarding any particular method of relief is governed by the particular situation which confronts it at the time of its decision. The decision of the Circuit Court of Appeals was handed down on November 16, 1931 (R. 164). The assets had then been transferred to the purchaser pursant to the decree of the District Court on June 15, 1931 (R. 173). The plan of reorganization had become operative (R. 173). The vast majority of the creditor body desired the reorganization to continue in effect (R. 173). The purchaser had continued the operation of the business. Actual sale as of June 15, 1931 was obviously impossible on November 16, 1931. Only an estimate was possible.

Substantial damage was certain to result from a decree that the sale be set aside in its entirety and that the assets be sold at public sale. Delay would have necessarily occurred between the time of such decree and a public sale held pursuant thereto. Prior to such sale it would have been necessary for the purchaser to render its accounting for the assets which it had received and much time would have been consumed therein. Sufficient advertisement of sale meant further delay. In the meanwhile, the business of the reorgan-

ized corporation would have ceased to function and the industry in which it occupied a dominant role, would have come to a standstill (R. 103). The trend of prices was downward (R. 126-7) and the value of the inventory was bound to depreciate. A further impairment of the good will of the business was certain to result from a cessation of operations. The expense of the preservation of the assets, pending resale thereof, would have placed an additional burden on the estate.

The benefits to be gained from an actual sale were dubious. The costs and charges incident to such a sale were substantial (R. 131). Whether any cash bid, worthy of the Court's consideration, would have materialized was uncertain. On this point, the proceedings had in the District Court were significant. In accordance with the order of the District Court, the Receiver published notice in the New York Times that a hearing would be held to consider all offers for the purchase of the defendant's assets (R. 16). Several prospective purchasers made inquiries, but upon the hearing there were no bids, and the District Court found as a fact (R. 151):

> "3. No offer other than said offer of Lily White dated April 29th, 1931 for the purchase of the assets of the defendant and of the Receiver's right, title and interest therein has been made."

The absence of bidders may be explained by the fact that the assets of the estate were subject to prior liens for unpaid taxes due to the Federal and State Governments for which, claims in excess of $150,000 had been filed. Unless the cash bid were in an amount sufficient to discharge the tax claims and proper expenses of administration, which were entitled to priority, nothing would be realized by unsecured creditors. The likelihood of obtaining a cash bid of at least $150,000 on public sale during the current depression is, to say the least, highly speculative. Appraisal by the Special Master was far more likely to approximate the true liquidation value of defendant's assets.

In rendering its decree and devising its remedy, the Circuit Court of Appeals properly gave consideration, not merely to the rights of petitioners, but to the rights of all interested parties. In its opinion the Court said (R. 173):

> "*An outstanding circumstance is the willingness of the majority of creditors to proceed with this reorganization, expressing the view, as they did in the court below, that the rehabilitation of White's business gave the best promise for the payment of their debts.* * * * But the minority creditors, appellants, insisting upon the right to share immediately in the proceeds of a forced sale of the corporation's assets, have dissented. Their rights must be protected. * * * *If a court of equity can protect these rights and at the same time carry out the wish of the other creditors who favor the plan of reorganization, it should be done.* The reorganization plan has been put into operation, and creditors, excepting the appellants, are content to have it proceed. *We think both may be protected.*"

The ritual of public sale would have added nothing to petitioners' substantive rights. On the contrary, it meant disruption of the reorganized business and loss to the estate. In substituting the determination of the Special Master, the Circuit Court merely dispensed with an empty and burdensome formula of adjustment and provided in its stead a remedy in accordance with the existing situation and the true balance of convenience. If, therefore, the Circuit Court of Appeals was correct in its determination that the dissenting creditors must be paid in cash, the procedure devised by that Court marks "a desirable development in the law of corporate reorganization." (*Coriell* v. *Morris White, Inc.: A Recent Development in the Law of Corporate Reorganizations*—(1932) 45 Harvard L. Rev. 697, 699.)

CONCLUSION.

The decree of the District Court, dated June 15, 1931, was a proper exercise of the power and discretion of that Court. It did not violate the petitioners' rights in requiring petitioners to accept something other than cash in satisfaction of their claims. Petitioners have no claim to any greater rights than were awarded to them under that decree. If, however, the District Court was in error, petitioners' claims have received proper and adequate recognition under the decree of the Circuit Court of Appeals.

Respondents therefore pray that the decree of the Circuit Court of Appeals be affirmed.

Dated: New York, December 7, 1932.

Respectfully submitted,

JOSEPH GLASS,
of New York, N. Y.

JOHN S. SHEPPARD,
of New York, N. Y.

JEROME WEINSTEIN,
of New York, N. Y.

MILTON C. WEISMAN,
of New York, N. Y.

NORMAN M. BEHR,
of New York, N. Y.

Counsel for Respondents.

CORRECTED COPY p. 2-4-5-9

SUPREME COURT OF THE UNITED STATES.

No. 8.—October Term, 1932.

National Surety Company, et al., Petitioners, *vs.* Valeria E. Coriell et al.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[May 22, 1933.]

Mr. Justice Brandeis delivered the opinion of the Court.

This case involves the validity of the reorganization of Morris White, Inc., pursuant to a decree of the federal court for southern New York. The old company, a New York corporation, is said to have been the largest manufacturer in the world of ladies' handbags and fancy leather goods. For many years prior to 1930 the business had been very profitable. Then, the company became financially embarrassed, partly through cancellation of orders due to the general depression, partly through withdrawals of large sums by Morris White for investments in stocks and real estate. The bank creditors intervened; and for nearly six months prior to April 6, 1931, the business was conducted by White under their financial supervision and control. On that day, they caused to be brought in the name of Coriell, a citizen of New Jersey, this suit through which the reorganization was effected.

The bill alleged that the company's assets exceed $4,000,000 and that its liabilities are approximately $1,000,000; that no quick assets are available to meet liabilities immediately payable; and that unless a receiver is appointed the assets will be wasted and the business destroyed through proceedings of creditors seeking payment. The prayers were that a receiver be appointed with power to carry on the business; and that, at the proper time, the properties be sold for the benefit of creditors, or be returned to the company. On the same day on which the bill was filed, the defendant answered admitting its allegations and assenting to the appointment of a temporary receiver. The Irving Trust Company was appointed. The receiver employed as counsel the solicitor for the complainant.

The receiver called promptly a meeting of the creditors; and a committee there elected examined into the company's affairs. The committee prepared a plan of reorganization which was submitted to the court in the form of an offer by Lily White (wife of Morris) to purchase all the assets. The plan (with later amendments) provided that all the purchased assets should be transferred, subject to existing liens, to a new corporation called the Morris White Handbag Corp.; that all creditors of the old company having claims not exceeding $100 be paid in cash; that the claims of creditors having priority by law, the fees and expenses of the receiver, the counsel fees and other expenses of the Creditors' Committee be paid or assumed by the new company; and that all other creditors should receive in payment of their claims 20 per cent in unsecured notes of the new company and 80 per cent in its preferred stock. No new money was to be embarked in the enterprise by either the Whites or others. Morris White (who had created and managed the business and owned all of the stock of the old company except a minority interest held by his brother, an employee) was to agree to serve the new company for three years at a salary not exceeding $60,000 a year. He and his wife were to have all of the common stock and, through control of the board of directors, substantial control of the new corporation. Accompanying the offer was an accountants' certificate unitemized stating that the liabilities shown on the books of the company as of April 6, the date of the appointment of the temporary receiver, were $1,072,000.30.

On May 12, 1931, the District Court entered an order requiring creditors to show cause on May 26th why that offer should not be accepted; and to consider and act upon any other offer which might then be made. On May 26th and 27th hearings were held. The receiver made no recommendation. The committee made no written report. Its counsel, who represented also several of the bank creditors, recommended, on its behalf, acceptance of the plan. He stated that the committee believed, in view of Morris White's record of achievement, that he would within a few years earn profits sufficient to pay all the creditors amounts equal to their existing claims, if he were permitted to resume the control and management of the business, with the prospect of complete ownership. The bank creditors and the larger merchandise creditors urged acceptance of the plan. The federal and state governments

offered to agree that the taxes due them might be paid by the new company in instalments.

The receiver had made no inventory and had not determined the amount of the liabilities. No one had made even an estimate of the value of the assets as of the date of the order to show cause, or, except as stated below, as of the date of the hearing. No figures were presented to indicate the course and results of the business while under the informal supervision and control of the banks, during the five months prior to the appointment of the temporary receiver; or during the seven weeks following his appointment. But that the bill had grossly overstated the assets was obvious. Instead of assets exceeding $4,000,000 as there alleged, it appeared that those available were worth, at most, a fourth of that amount. Items aggregating $2,277,714.89 consisted of obligations and securities of associated and subsidiary companies, which were probably worthless. The substantial assets consisted, according to the books, of the following items: Merchandise and supplies which had cost $1,241,208.09; bills receivable aggregating $301,852.12, of which $251,409.42 were pledged to the banks; machinery entered as having cost, less depreciation, $74,265.01; and $5,614.60 cash. Based on an appraisal made by a subcommittee shortly after the appointment of the temporary receiver, the Creditors' Committee estimated the value of the merchandise as of that date to be $717,000, on the basis of a continuing business. Counsel for the receiver, estimating the value of the merchandise as of the date of the hearing, on the basis of a continuing business, stated that it was worth about $462,500; and that there was cash on hand in the amount of $54,000 and unpledged accounts receivable of $67,000. He stated that the committee estimated the value of the merchandise, if disposed of at forced sale, to be $357,000. Another statement was made to the effect that the committee estimated the total value of the assets at forced sale to be $182,000. Whether this figure included the assets pledged to the banks was left in doubt. The court was told that Morris White had an informal assurance that banks would give to the new company the necessary temporary accommodations required for working capital.

A substantial minority of the creditors objected strenuously to the acceptance of the plan. The dissenting creditors urged, in support of their objections, that no inventory and valuation of the assets had been made by the receiver or under any order of

the court; and that not even the amount and character of the liabilities had been determined by the receiver, or otherwise by the court. They questioned whether bank creditors had not received (while they were in substantial control of the business) unlawful preferences. They asked that time be given for the appropriate determination of these matters and for further investigation as to the merits of the plan. They pointed out that under it the banks were to receive notes and preferred stock to the full amount of their claims, although they held assigned accounts as collateral. And they protested against disposing of the assets otherwise than for cash after public sale and without competitive bids being sought. The committee of creditors insisted that any delay would be disastrous, the business being seasonal.

The District Judge announced, at the close of the hearing on May 27th, that he would direct the receiver to accept the Lily White offer. An order making permanent the receivership was entered later. On June 15, 1931, pursuant to the decree, the assets were transferred to the Morris White Handbag Corp. And it entered upon the conduct of the business, although application for allowance of an appeal had been promptly made by the National Surety Company and other dissenting creditors. Five months later the Circuit Court of Appeals reversed the decree of the District Court and remanded the cause for further proceedings in accordance with its opinion. 54 F. (2d) 255.

The Court of Appeals held, among other things, that creditors who refuse to assent to a plan of reorganization have "the right to share immediately in a forced sale of the corporation's assets"; and that a court of equity lacks "power to compel a creditor of any kind to accept stocks or promises to pay in the future in full extinguishment of his claim, without being afforded the alternative of receiving his proportionate share of the proceeds of the conventional sale of the property in cash." It declared that ordinarily dissenting creditors would be "entitled to a public sale with competitive bidding, the assets to be sold to the highest bidder"; that this right must be fully protected; but that, in the case at bar, this right could be fully protected without setting aside the sale made to the new corporation; that the right of the dissenting creditors would be protected "by having an appraisal of the value of their respective claims made before a master, to be appointed, who will take an account of the assets and liabilities of Morris White, Inc., ascertaining the value of the assets as if sold at a

public sale"; by the payment to them of "their proportionate share of the price which would have been realized at such sale after deduction of administrative expenses"; and by providing that if "payment is not thus made in cash, the several amounts which appellants are found entitled to may be collected by a sale of the property transferred to the new corporation."

Pursuant to the mandate of the Circuit Court of Appeals, the District Court entered on February 2, 1932, a decree which ordered that (subject to the orders to be made), "the reorganization plan approved by it June 15, 1931, be allowed to continue in operation and the Morris White Handbag Corporation be and is hereby permitted to continue in the conduct of the business heretofore transferred to it. . . ."[1] On February 23, 1932, the dissenting creditors petitioned for a writ of certiorari to review the decree of the Circuit Court of Appeals entered November 23, 1931; and the writ was granted on May 12, 1932. 286 U. S. 537.

---

[1]The decree entered February 2, 1932, modified that of June 15, 1931, as follows:

(A) It reversed the same so far as it affects the rights of the National Surety Company and the other dissenting creditors.

(B) It provided that a special master be appointed who shall:

(1) "Ascertain the several amounts of [their] respective claims," among other things.

(2) "Make an appraisal of the realizable value of said claims as of June 15, 1931" and that to this end the Special Master "shall ascertain and report the then realizable value of said assets as if sold at public sale; and shall also take account of the liabilities of Morris White, Inc., as of April 6, 1931, and shall ascertain and report which, if any, of said liabilities are entitled to priority of payment; and shall also take an account of the obligations of the Receiver herein and of the expenses of administration of the estate herein incurred up to the fifteenth day of June, 1931; and shall determine through examination of officers and/or agents of the defendant and/or The Morris White Handbags Corporation, the nature, quality and amount of inventory on hand as of such dates as may be pertinent to this enquiry.

(3) "Ascertain and report the aliquot share of the assets to be awarded and paid in cash, subject to further order of this court, to National Surety Company [and to the other dissenting creditors] out of the sum ascertained to be the amount that would have been realized for the assets of Morris White, Inc., on June 15, 1931, had a public sale of said assets been held, after the deduction from said sum of such portion of the obligations of the Receiver and the expenses of administration herein as would have been properly chargeable against the estate had the assets of Morris White, Inc., been liquidated by sale, and the proceeds distributed to creditors in ordinary course, and after the deduction of the liabilities of Morris White, Inc., entitled to priority of

The petitioners contend that the District Court had no power to deprive the dissenting creditors of a cash share in the assets; that the amount of this share should have been determined by a public sale; that the right of dissenting creditors was not protected by the decree directing an appraisal (in 1932) of the assets as if disposed of at public sale on June 15, 1931; and that they were entitled to recover their claims in full. The respondents insist that the District Court had power to compel participation in the reorganization without the alternative of a share of the assets in cash; and that even if the District Court lacked that power, the modification of the decree by the Circuit Court of Appeals gave full protection to the rights of the dissenting creditors. We have no occasion to pass upon any of these contentions.[2] For we are of opinion that the decree approving the plan should have

payment; or at the option of each of them the preferred stock and notes heretofore offered to them, pursuant to said offer of Lily White, may and shall in like manner be valued by said Special Master, as of the date the reorganization plan became effective, to be awarded and to be paid in cash to them or any of them subject to the further order of the court; . . .

(4) "That pending the entry of an order of this court upon the report of the said Special Master and for the purpose of securing to National Surety Company [and the other dissenting creditors] payment by the said The Morris White Handbags Corp., pursuant to the order herein dated June 15, 1931, of the amounts which may be determined to be paid to them in cash upon their respective claims, a lien is hereby imposed upon all the assets of Morris White, Inc., transferred to and remaining in the possession of said The Morris White Handbags Corp. pursuant to said order dated June 15, 1931; except that as to such of said assets as the said The Morris White Handbags Corp. shall hereafter in good faith transfer in the regular course of its business for fair and proper consideration, said lien shall attach to the proceeds of such transfer or successive transfers of such proceeds, and the said The Morris White Handbags Corp. is hereby enjoined and restrained subject to the further order of this court, from transferring any of said assets of Morris White, Inc., remaining in its possession except in good faith in the regular course of its business and for fair and proper consideration, unless the said The Morris White Handbags Corp. shall file a bond or other security in such amount as may be fixed and approved by this court after hearing the parties in interest; . . ."

[2]The petitioners made the further contention that the court should have ordered the case to proceed in bankruptcy, or at least should not have permitted it to continue in equity. This question was not before us on the writ of certiorari. The order of June 3, 1931, making the receivership permanent, recited that there was no opposition to the order. It was affirmed by the Circuit Court of Appeals, and certiorari was denied by this Court. 286 U. S. 553.

been reversed in its entirety because the procedure pursued by the District Court was improper.

First. The non-assenting creditors were entitled to have the plan and their objections considered in an orderly way, and to a decree based on adequate data. The District Court had before it, in support of the plan, only informal, inadequate and conflicting *ex parte* assertions unsupported by testimony. It undertook to pass upon the wisdom and fairness of the plan of reorganization, and the rights of non-assenting creditors. For the proper disposition of these questions definite, detailed, and authentic information was essential. Such information was wholly lacking. The receiver submitted no facts and made no recommendations. There was no evidence on which the court could have found even that a majority of the unsecured creditors favored the plan.[3] There was no valuation of the assets by a disinterested appraiser; no account of the results of the operations of the business during the five months in which it was under the control of the banks; no account of the result of the operations under the receivership; and no dependable schedule of liabilities of the corporation showing the number of creditors, the amount owed to each, and the collateral held. A trustworthy appraisal; an account showing the result of recent operations of the business; an accurate determination of the number of creditors, the amounts of their respective claims, and the extent to which collateral given or payments made to them might be deemed preferences; these were facts which might have influenced the court in deciding whether the plan should be approved

[3]Even the number of creditors appears to have been undetermined. The number was stated by Mr. White to be 150, in addition to 5 bank creditors. The president of one of the creditor banks gave the number as 150 including the banks. Counsel for Morris White, Inc., stated that there were 245 creditors, "not 145." Counsel for the receiver stated that there were 193 creditors whose claims were each less than $100. Counsel for Morris White, Inc., gave the number of such creditors as 50 or 100. The amount represented by the creditors' committee appears likewise to have been in doubt. Counsel for the committee stated that it represented merchandise claims in the amount of $178,000. Counsel for Morris White, Inc., stated that the committee represented merchandise claims of over $300,000; later he gave the figure as $180,000 out of $442,000 of merchandise claims. At the argument in this Court it was stated that, at the hearing before the District Court pursuant to the mandate of the Circuit Court of Appeals, a new claim against Morris White, Inc., in the sum of $1,025,000 was presented and that a rule to show cause issued.

or should be approved only upon a public sale. The failure to require relevant data before deciding whether the plan should be approved was not cured by the declaration of the Circuit Court of Appeals that the dissenting creditors were entitled to an aliquot share of what, a year later, it might be estimated the property would have brought at a public sale, and authorizing them to recover that amount, if assets available to satisfy their claims were then available.

Second. Every important determination by the court in receivership proceedings calls for an informed, independent judgment. In the case at bar special reasons existed why the court should have secured adequate, trustworthy information. The proceeding was not an adversary one; and jurisdiction rested wholly upon the consent of the defendant corporation.[4] The court did not have the advice of its receiver. The creditors who approved of the plan of reorganization appeared to be actuated in their recommendations and desires by considerations not applicable to the dissenting creditors. For the bank creditors, unlike the others, were to a large extent secured by the pledge of assets and may, moreover, have received preferences which would be held invalid if bankruptcy proceedings were instituted. The assenting merchandise creditors were interested not merely as creditors but as sellers of goods; and it appeared that at least some were far more interested in expected profits from future sales than in possible dividends on their existing claims. On the other hand, the dissenting creditors, largely credit indemnity companies, were anxious to have determined the amounts of their risks and to obtain as promptly as possible dividends in cash.

The respondents directed attention to the proposed amendments to the Bankruptcy Act, which have been enacted in part since the argument;[5] and, as justifying the procedure challenged, urge

[4]Compare Harkin *v.* Brundage, 276 U. S. 36, 52, 55; Michigan *v.* Michigan Trust Co., 286 U. S. 334, 345; Municipal Finance Corp. *v.* Bankus Corp., 45 F. (2d) 902; Kingsport Press, Inc. *v.* Brief English Systems, Inc., 54 F. (2d) 497, 501.

[5]Act of March 3, 1933, c. 204, § 1, 47 Stat —. Particular attention was called to the proposed section providing for corporate reorganizations. This section was not enacted. It was intended as an extension of the principle of composition agreements, "that the views of a substantial majority of the creditors should control the measures to be adopted for the protection and preservation of their rights in the failing business, subject at all times to a

that those amendments confer power on the District Courts in Bankruptcy similar to that exercised in the case at bar. But this is not true. Those amendments relating to compositions and extensions for insolvent debtors make detailed provision for an inventory by the receiver; for a schedule of liabilities; for an examination of the debtor; and for fixing, with reference to the convenience of the parties, a date and place for hearings upon applications for confirmation of composition or extension proposals.[6]

The decree of the Circuit Court of Appeals is reversed; that of the District Court entered February 2, 1932 vacated; and the case is remanded to the District Court for further proceedings not inconsistent with this opinion. We do not pass upon the scope, the measure or the incidence of the relief to which the petitioners are entitled; among other reasons, because of the following facts brought to our attention at the argument. On April 29, 1932, the Morris White Handbag Corp. was adjudged bankrupt. On June 6, 1932, a sale for $53,850 of all its tangible assets was confirmed by the District Court. The Morris White Handbag Corp., its trustee in bankruptcy, and the purchaser at the bankruptcy sale are not parties to the case at bar.

Reversed.

finding by the court that what they propose is fair and equitable to the minority." See Report of Attorney General on Bankruptcy Law and Practice, Appendix to Message of the President Recommending the Strengthening of Procedure in the Judicial System, Sen Doc. No. 65, 72d Cong., 1st Sess., p. 90.

[6]Section 74 (b)-(g). The procedure was designed to be more rigorous than that previously obtaining. See Report of Attorney General, *supra* note 5, p. 87; also, Hearings before the Subcommittees of the Committees on the Judiciary, 72 Cong., 1st Sess., on S. 3866, p. 635 (Statement of Lloyd Garrison, Special Assistant to the Attorney General); *id.*, p. 113 Annotation to subsection (b). The requirements for the reorganization of railroads are more rigorous.

Compare the recommendations of The Special Committee on Equity Receiverships of the Association of The Bar of The City of New York, Year Book, 1927, pp. 299-331; *id.*, 1930, pp. 407-411; *id.*, 1932, pp. 333-334; and the minority report, *id.*, 1930, pp. 411-422. See also Equity Rules IV-XI, Southern District of New York, effective July 1, 1931.